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MBA PROFESSIONAL REPORT

CONTRACTING WITH THE ENEMY: THE CONTRACTING OFFICER'S DILEMMA

June 2015

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**CONTRACTING WITH THE ENEMY: THE CONTRACTING OFFICER'S
DILEMMA**

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Submitted in partial fulfillment of the requirements for the degree of

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**NAVAL POSTGRADUATE SCHOOL
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ABSTRACT

Operational contract support activities during stability and reconstruction operations rely significantly on local national contractors to provide goods and services for U.S. forces. In some cases, local national contractors are given priority in competition for contracts as a means of stimulating and rebuilding the local economy. A major risk associated with using local national contractors in contingency environments is the presence of business entities that may directly or indirectly support adversarial forces. Entering into contracts with enemy-affiliated business entities creates significant contractual and security risk for U.S. forces.

Mitigating the effects of enemy-affiliated business must be a priority for contingency contracting officers. However, the process of preventing enemy-affiliated business entities from contracting with the U.S. government is complex and difficult to navigate. In this MBA Report, we analyze the reasons for this complexity and provide future policy recommendations to better counteract the contracting-with-the-enemy phenomenon.

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LIST OF ACRONYMS AND ABBREVIATIONS

AAE	Army Acquisition Executive
AFARS	Army Federal Acquisition Regulation Supplement
APA	Administrative Procedure Act
AQAP	al-Qa'ida Arabian Peninsula
ASA(ALT)	Assistant Secretary of the Army (Acquisition, Logistics, and Technology)
ASCC	Army service component command
C2	command and control
CCO	contingency contracting officer
CENTCOM	Central Command
CERP	commander's emergency response program
CFIUS	Committee on Foreign Investment in the United States
CFR	Code of Federal Regulations
CITF-A	Criminal Investigation Task Force-Afghanistan
CJ2X	Combined Joint Staff for Counter Intelligence and Human Intelligence Operations
CJTSCC	CENTCOM-Joint Theatre Support Contracting Command
COCO	chief of contracting office
COCOM	combatant commander
COFC	Court of Federal Claims
CRS	Congressional Research Service
CSA	combat support agency
CSB	contracting support brigade
CSTC-A	Combined Security Transition Command Afghanistan

DCCHB	Defense Contingency Contracting Handbook
DFARS	Defense Federal Acquisition Regulation Supplement
DOD	Department of Defense
DOJ	Department of Justice
DOS	Department of State
DPAP	Defense Procurement and Acquisition Policy
DS	direct support
ECC	Expeditionary Contracting Command
EMA	Ettefaq Meliat Hai Afghanistan Consulting, Incorporated
ETP	exception to policy
FAR	Federal Acquisition Regulation
FRAGO	fragmentary order
FTO	foreign terrorist network
GCC	geographic combatant command
GS	general support
HCA	head of contracting activity
HNT	host nation trucking
IJC	International Security Assistance Force Joint Command
ITV	in-transit visibility
JCCS	joint contingency contracting system
JFC	joint force commanders
JP	joint publication
JTF	joint task force
JTSCC	joint theatre support contracting command

KO	contracting officer
KTR	contractor
LSC	lead service component
MGAA	Mesopotamia Group Atlas Apache
NAT	National Afghanistan Trucking
NDAA	National Defense Authorization Act
NSS	National Security Strategy
OMB	Office of Management and Budget
PALT	procurement administrative lead time
PARC	principal assistant for responsible for contracting
PSC	private security contractor
RCC	regional contracting center
RCO	regional contracting office
SCO	senior contracting official
SCO-A	Senior Contracting Official-Afghanistan
SDO	suspension and debarring official
SF	standard form
SIGAR	Special Investigator General for Afghanistan Reconstruction
SIGIR	Special Investigator General for Iraq Reconstruction
SPE	senior procurement executive
SWAT	special weapons and tactics
TF	task force
TMR	transportation movement request

UCMJ	Uniformed Code of Military Justice
USACE	U.S. Army Corps of Engineers
USAID	U.S. Agency for International Development
U.S.C.	United States Code
U.S.C.A.	United States Code Annotated
USCENTCOM	United States Central Command
USF-I	United States Forces-Iraq
USFOR-A	United States Forces-Afghanistan
USG	U.S. Government

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I. INTRODUCTION

The Department of Defense (DOD) has increasingly relied on contractors for a critical array of support functions in contingency environments. This trend is evident in the recent conflicts in Iraq and Afghanistan. In March 2013, the number of contractors in Afghanistan exceeded the number of troops by more than 40,000 people (Schwartz & Church, 2013). This reliance on operational contract support (OCS) has created greater economies of force for joint force commanders (JFCs) as a greater percentage of the troops deployed to contingency environments can be used in direct combat or combat support roles. As operations in both Iraq and Afghanistan transitioned toward stability and reconstruction efforts, OCS was used as a tool to stimulate those countries' host nation economies. The National Defense Authorization Act (NDAA) of 2008 provided language allowing DOD contracting officers to limit competition and created a preference for goods and services from Iraq and Afghanistan (Public Law 110-181, § 886, 2008). While noble in its intent, the public law increased reliance on contractors and preference for goods and services sourced from host nation contractors, which has unintentionally increased the DOD's risk of entering into contracts with enemy business entities.

The risk of contracting with enemy business entities is not a new one. The government first struggled with the problem during the reconstruction period following the Civil War (James Filor et al. v. The United States, 1867). More recently, the problem of contracting with the enemy in Afghanistan was brought to light by a congressional investigation into the Host Nation Trucking (HNT) contract. The HNT contract was a \$2.16 billion contract to transport supplies to U.S. military installations throughout the country. Upon investigation, it was determined that the trucking companies contracted to provide logistical support were also providing protection payments to Taliban commanders (Tierney, 2010). The U.S. government was inadvertently helping the Taliban by funding its operations and potentially providing them access to U.S. infrastructure. The United States' potential to contract with the enemy is not a new one, nor should it be considered specific to one particular conflict theater.

In response to the dangers of contracting with the enemy, Congress included a policy rider in the 2012 NDAA aimed at prohibiting the award of contracts to enemy persons or entities (Public Law 112-81, 2011, § 841). The law required the commander of U.S. Central Command (CENTCOM) to identify contractors affiliated with the enemy. The CENTCOM list of enemy-affiliated contractors is then forwarded to the Head of Contracting Activity (HCA) for action in the form of restriction of award or termination for default of existing contracts with enemy-affiliated businesses. This system, known as vendor vetting, has been used to identify business entities operating in Afghanistan that directory or indirectly support enemy operations. Unfortunately, the law has not been sufficient to prevent enemy entities from contracting with the U.S. government. The legislation's limitations were first reported in a Special Inspector General for Afghanistan (SIGAR) report in 2013. That report concluded that the DOD could not provide reasonable assurance that their implementation of Section 841 successfully prevented contracting with the enemy (SIGAR, 2013). One problem with the implementation of Section 841 guidance is the Army's reluctance to refer enemy-affiliated contractors for suspension and disbarment (McHugh, 2013). Instead, the Army is relying on the individual contracting officer to make prudent decisions to preclude enemy businesses from competition.

The ultimate responsibility for preventing the award to and terminating existing contracts with enemy-affiliated businesses rests with the contracting officer. The contracting officer has the authority to make responsibility determinations of prospective contractors and execute current contract terminations. The contracting officer must prudently apply these tools. In 2013, the U.S. Court of Federal Claims (COFC) heard a case in which the plaintiff sued the government for creating a scenario that resulted in de facto debarment for companies identified as affiliated with the enemy in accordance with Section 841 (*MG Altus Apache Company v. United States*, 2013). Altogether, the combination of laws, policies, and court cases creates a difficult environment for contingency contracting officers to navigate. This environment's complexity is exacerbated by the inherent conflict between the need to make a military decision to prevent enemy businesses from competing for contracts and traditional government

acquisition policies that tend to favor full and open competition to the maximum extent possible. Ultimately, the contracting officer is faced with a dilemma in which he or she must carefully navigate between just and competing policy initiatives.

A. PURPOSE AND SCOPE

The purpose of this research is to alleviate the burdensome process created by the contracting officer's dilemma. We accomplish this by first examining and identifying the tools available to contracting officers to prevent enemy business entities from competing for contracts. Then, we identify specific policy recommendations that have the potential to eliminate the contracting officer's dilemma by mitigating the discretionary factors associated with the decision to prevent an enemy-identified business from competition. The end state of this paper is for readers to be aware of the problem, equipped with the knowledge to mitigate its severity, and educated on policy alternatives that have the potential to alleviate contracting with the enemy.

We crafted the following research questions to help guide our study of contracting with the enemy:

- How can standard contracting processes like those authorized by the FAR be used by contracting officers to prevent contracting with the enemy?
- How do the evidentiary standards and burdens of proof required to prevent an enemy-affiliated contractor from competing for a contract compare with the standards typically associated with enemy status determinations, including lethal targeting?
- What conflicts are created when contracting officers use standard contracting processes to exclude sources from competition in order to achieve the military goal of preventing enemy businesses from competing for contract award?

This research paper focuses primarily on the challenges of preventing contracting with the enemy through the lens of the contingency contracting officer.

B. BENEFITS AND LIMITATIONS

The results of this research can be used to educate contingency contracting officers (CCOs) on the challenges of preventing contracting with the enemy. This report creates greater awareness of the threat posed by enemy business entities and educates

CCOs on the specific tools available to them to mitigate the threat. Additionally, this report can be used by policy makers to develop future policies that can further mitigate the threat.

This research is limited by the availability of unclassified and publicly releasable information available on the topic. Specific information regarding the vendor vetting program and how it is used to identify enemy businesses is classified and not publically releasable. Additionally, the COFC issued decisions on cases pertinent to the vendor vetting program that were originally issued as classified decisions and, only upon significant redaction, were issued to the public. Our research only reviews publically releasable and unclassified material.

C. RESEARCH METHODOLOGY

We conducted a thorough content analysis of all available and pertinent literature regarding the topic of contracting with the enemy. More specifically, we studied reports from government agencies, established laws and regulations, and court-issued decisions and interpretations on the subject. This study has helped us identify commonalities, disagreements, and gaps in knowledge that enabled us to answer our established research questions and reach our conclusion.

D. ORGANIZATION OF THE REPORT

This report is organized in four chapters. Chapter I introduces the topic. In Chapter II, we perform a literature review of existing pertinent studies of the research topic. Chapter III contains the bulk of our study, in which we thoroughly analyze the dilemma facing contingency contracting officers tasked to prevent contracting with the enemy. Finally, Chapter IV presents the conclusions of our study and a specific policy recommendation designed to alleviate the threat of enemy business entities.

E. SUMMARY

This thesis examines the traditional contract processes authorized for use by contracting officers to exclude specific sources from competition, the vendor vetting program established to identify enemy business entities, and established case law that is

pertinent to contracting with the enemy. Additionally, we compare the standards of evidence and burden of proof required to prevent an enemy business from competing for contract award with the standards of evidence and burden of proof necessary to target hostile enemy combative.

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II. LITERATURE REVIEW

The preponderance of existing literature regarding the modern challenge of contracting with the enemy has been published by agencies, groups, and individuals who are performing in a government oversight capacity. Of note, the Special Inspector General for Afghanistan (SIGAR) has made a point to repeatedly report on the challenges of the problem in its quarterly reports to Congress. In addition to the SIGAR, other agencies, like the Special Inspector General for Iraq Reconstruction (SIGIR) and the U.S. Congress, have commissioned reports on the contracting with the enemy topic and suggested recommendations to mitigate its challenges. In this literature review, we examine the existing body of knowledge regarding the topic of contracting with the enemy.

A. WARLORD, INC.

In June 2010, a report of the majority staff of the Subcommittee on National Security and Foreign Affairs was presented to the U.S. House of Representatives. The report, titled *Warlord, Inc.*, provided evidence that the DOD's \$2.16 billion contract for logistical support had the potential to serve as a major funding source for the Taliban (Tierney, 2010). The contract, known as the HNT contract, "provides trucking for over 70 percent of the total goods and materiel distributed to U.S. troops in the field" (Tierney, 2010, p. 1). A key element of the contract specified that the contractors hired to do the trucking would be solely responsible for the security of their convoys. An unintended consequence of that contract stipulation created a de facto protection racket in which the transportation contractors would hire local warlords to provide security along the route. In addition to creating a harmful atmosphere of corruption and encouraging the behavior of unscrupulous warlords, Tierney's report concluded that "protection payments for safe passage are a significant potential source of funding for the Taliban" (Tierney, 2010, p. 34). The report went on to note that the Criminal Investigation Task Force (CITF-A) conducted an investigation into the allegations that the HNT contract funded insurgent organizations and that Task Force (TF) 2010, a joint military organization tasked with

investigating corruption stemming from U.S. contracts, was established in response to the HNT contracts problems.

While *Warlord, Inc.* is significant in the fact that it demonstrated the gravity of the contracting-with-the-enemy problem, its recommendations to Congress focused mostly on increasing contract oversight of logistics contractors in Afghanistan. All of the report's recommendations are tailored specifically to the challenge of contracting for logistics support in Afghanistan. None of the report's recommendations suggest that the U.S. government take action to preclude contractors affiliated with enemy organizations from competing on future contracts in other theaters of operations.

B. SIGIR REPORT ON CERP PROGRAM IN IRAQ

In April 2012, SIGIR published the results of an investigation they conducted into the Commander's Emergency Response Program (CERP) in Iraq. Instead of studying the effects of traditional contracting mechanisms, the report focused on the use of CERP funds by former unit commanders in Iraq. Between 2004 and 2010, over \$4 billion in CERP funds were authorized by congress for use in Iraq. According to SIGIR (2012, p. 1), "The CERP's purpose was to enable commanders to respond to urgent humanitarian relief and reconstruction requirements within their areas of responsibility by carrying out programs and projects that provided immediate support to Iraqi people." The investigation surveyed a sample of Army and Marine battalion commanders, U.S. Army Corps of Engineers (USACE) officials, Department of State (DOS) personnel, and officials of the U.S. Agency for International Development (USAID). The survey's objectives were not specifically designed to identify or report on specific instances in which CERP funds were funneled to enemy organization, yet some of the survey respondents stated that they were aware that CERP funds may have fallen into insurgent hands. Most described a scenario similar to that of the HNT protection schemes in which some of the money spent on CERP projects was in turn distributed to insurgent organizations for protection (SIGIR, 2012). The SIGIR report does not provide specific recommendations aimed at mitigating the threat of CERP funds falling into enemy hands,

but it does stand as evidence that the problem is not unique to Afghanistan nor is it unique to large logistics and trucking contracts.

C. SIGAR LETTER TO CONGRESS, SEPTEMBER 18, 2012

In a September 2012 letter to members of the U.S. House of Representatives, the Special Inspector General for Afghan Reconstruction John F. Sopko detailed the challenges of implementing the provisions of Section 841 of the FY 2012 NDAA. Sopko's letter followed previous testimony to Congress and specifically lamented the delay in suspending and debarring contractors identified as affiliated with enemy groups. According to Sopko, the SIGAR had referred 242 cases to the Department of the Army, State Department, or USAID for suspension and debarment. Of those 242 cases, 106 were still pending adjudication, including 43 cases that involved "insurgent" businesses (Sopko, 2012). Sopko argued that the government should suspend and debar those outstanding cases immediately and stated that SIGAR formally requested to be granted suspension and debarment authority from the Office of Management and Budget (OMB). That authority, however, had not and has since not been delegated to SIGAR for use in Afghanistan.

D. SECRETARY OF THE ARMY RESPONSE TO SENATOR JEANNE SHAHEEN

In January 2013, the secretary of the Army, John M. McHugh, wrote a response to an inquiry from Senator Jeanne Shaheen. The response resulted from a letter sent to the secretary from Senator Shaheen concerning the suspension and debarment recommendations made by SIGAR. In the response to Senator Shaheen, Secretary McHugh describes the Army's position on suspending and debarring contractors designated on the enemy entity list in accordance with Section 841 of the FY 2012 NDAA. The 43 cases pending adjudication mentioned in the SIGAR's letter are specifically mentioned by Secretary McHugh, who states that the SIGAR cases were referred for suspension and debarment without "any supporting evidence other than the fact that the subject individuals or entities were so designated" (McHugh, 2013, p. 1). Secretary McHugh went on to say that FAR § 9.406 requires a preponderance of

evidence showing that the contractor has engaged in serious misconduct in order to suspend and debar. Finally, Secretary McHugh concluded that “debarment based solely upon entry on the Entity List or Section 841 designation would fail to meet due process requirements and would likely be deemed arbitrary and capricious if challenged in court under the Administrative Procedure Act review” (McHugh, 2013, pp. 1–2). This position is at odds with the stance taken by SIGAR in its letter to Congress and demonstrates the difficulties associated with suspending and debarring enemy-affiliated business entities.

E. SIGAR REPORT ON CONTRACTING WITH THE ENEMY

In April 2013, SIGAR published a report titled that highlighted the challenges faced by DOD in preventing contracting with the enemy. The report was one of the first publications to address the challenges of precluding enemy-affiliated businesses from competition. In the report, SIGAR studied the effectiveness of the control measures put in place by the DOD to implement the requirements stipulated in Section 841 of the FY 2012 NDAA. SIGAR ultimately concluded that the DOD’s processes to identify enemy-affiliated contractors were not completely sufficient, especially when dealing with prospective subcontractors in Afghanistan. Additionally, the report stated that the DOD had not provided sufficient guidance to Heads of Contract Authority (HCA) on how to manage legal challenges to the enforcement of Section 841. Finally, the report concluded that the language of Section 841 was not sufficient in strength, stating that it did not cover DOS and USAID contracts in the CENTCOM Theater of operations. Furthermore, the SIGAR also called into question whether or not Section 841 designations were legally enforceable and bemused the fact that the legislation was scheduled to expire in 2014, prior to when U.S. forces were scheduled to leave the country.

The SIGAR provided seven recommendations for action to help mitigate the contracting-with-the-enemy problem. They are as follows:

- Require all Heads of Agency in the CENTCOM theater of operations, including Afghanistan, develop a standard mechanism for distributing Section 841 notification letters to their HCAs.
- Require all HCAs with contracts in the CENTCOM theater of operations, including Afghanistan, to develop a standard mechanism for distributing Section 841 notification letters to all prime contractors.

- Direct HCAs to require prime contractors to certify that they do not have subcontracts with Section 841 designees.
- Require all DOD contracting agencies and prime contractors with contracts in the CENTCOM theater of operations to use an information system, such as the Joint Contingency Contracting System or the CENTCOM website, to track the Section 841 designations.
- Enforce DFARS Class Deviation 2012-O0005 that requires the Section 841 clause be included in contracts, unless HCAs provide justification for exemption.
- Formally assign either the Office of Defense Procurement and Acquisition Policy or CENTCOM the responsibility for centrally tracking, at a minimum, the number and value of contracts, grants, and cooperative agreements HCAs have restricted, terminated, or voided using their Section 841 authorities.
- Develop and distribute guidance to HCAs about actions to take once they have restricted, terminated, or voided a contract under Section 841.
(SIGAR, 2013, pp. 8–9)

The SIGAR's recommendations focused heavily on standardizing the processes used to identify enemy business entities and disseminate that information to HCAs. Furthermore, the SIGAR was concerned with the potential for prospective subcontractors to funnel money to enemy entities. Finally, recommendation seven specifically highlights the problem of legal challenges to the enforcement of Section 841. This is the first time that the problem of using the contract processes authorized by the FAR to solve a military problem, like that of enemy-affiliated contractors, was acknowledged by a government agency.

F. SIGAR QUARTERLY REPORT TO THE UNITED STATES CONGRESS, OCTOBER 30, 2014

In late 2013, John Sopko reiterated his frustrations with current policies regarding contracting with the enemy.

This quarter, I must once again reiterate my concerns about the policies of the U.S. Army's suspension and debarment program. As I have pointed out in our last six quarterly reports, the Army's refusal to suspend or debar supporters of the insurgency from receiving government contracts because the information supporting these recommendations is classified is not only legally wrong, but contrary to sound policy and national-security goals. I remain troubled by the fact that our government can and does use classified information to arrest, detain, and even kill individuals linked to

the insurgency in Afghanistan, but apparently refuses to use the same classified information to deny those same individuals their right to obtain contracts with the U.S. government. There is no logic to this continuing disparity. I continue to urge the Secretary of Defense and Congress to change this misguided policy and to impose common sense on the Army's suspension and debarment program. (Sopko, 2014, p. iii)

This excerpt was included in Special Inspector General John Sopko's introduction to the agencies quarterly report to Congress dated October 30, 2014. The tone of Sopko's report indicates a high degree of frustration with the U.S. Army's decision not to suspend and debar contractors identified by the provisions of Section 841. Sopko also identified a significant injustice created by U.S. government policy in Afghanistan where the military used classified information to "arrest, detain, and even kill individuals linked to the insurgency," yet would not use the same classified information to suspend and debar contractors (Sopko, 2014, p. iii).

G. SIGAR QUARTERLY REPORT TO THE UNITED STATES CONGRESS, JANUARY 30, 2015

In the January 30, 2015 report, Sopko provided a more optimistic opinion on the government's efforts to prevent contracting with the enemy. After reiterating his concerns about the Army's policy on suspension and debarment, Sopko (2015, p. iii) said about the prospect of reform:

I am encouraged by the fact that the new U.S. military leadership in Afghanistan shares our concerns about this issue. Following a briefing by SIGAR in Afghanistan this quarter, we learned that the Army's newly appointed Suspension and Debarment Official has begun a review of the issue. I am hopeful that common sense will ultimately be applied to the Army's suspension and debarment program to prevent supporters of the insurgency from obtaining government contracts.

Despite the SIGAR's cautious optimism, there is no significant indication that the government is becoming more effective at combating enemy-affiliated contractors.

H. CONCLUSION

The dangers of contracting with the enemy have been discussed widely amongst members of the U.S. legislature, the DOD, and government oversight agencies like SIGAR and SIGIR. Those entities unanimously agree that contracting with the enemy is a real danger that poses serious and grave threats to U.S. security interests, and generally agree that more needs to be done to mitigate the effects of enemy-affiliated contractors. Consensus agreement does not exist regarding which method or methods should be employed to restrict contracting with the enemy, though. SIGAR has repeatedly lobbied for expedited suspension and debarment of businesses identified as Section 841 entities. On the other hand, the secretary of the Army has decided that businesses that are designated Section 841 entities don't warrant suspension and debarment unless a preponderance of evidence exists that indicates that the businesses engaged in serious misconduct. Figure 1 is a chronological depiction of the literature we reviewed during this study. In the next chapter, we examine the burden that policy creates for contingency contracting officers.

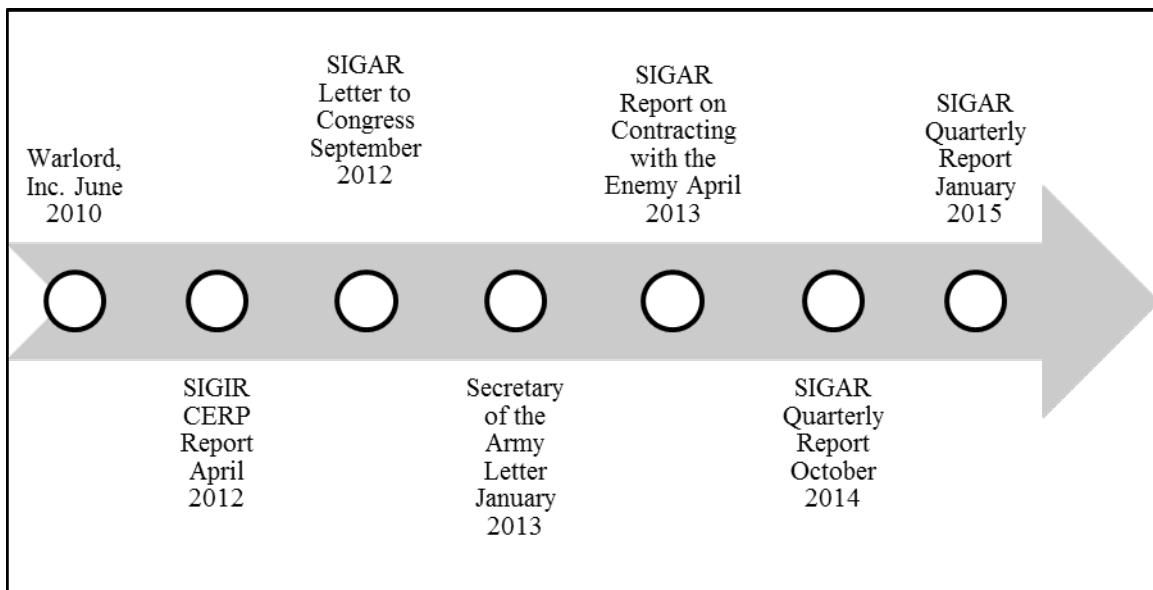


Figure 1. Literature Review Chronology

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III. THE CONTRACTING OFFICER'S DILEMMA

In this chapter, we exam the cumulative factors that affect the contracting officer's ability to mitigate contracting with the enemy. First, we discuss the inherent differences between command authority, contract authority, and suspension and debarment authority. Then, we define the standard contracting processes available to the contracting officer. Next, we compare the legal standards associated with standard contract processes with those used by the government for military status determinations. Following that, we provide research from our case law study that examines how the judicial system has interpreted laws and regulations pertinent to the contracting-with-the-enemy problem. Finally, we conclude the chapter by explaining how the cumulative effects of laws, regulations, and polices create the contracting officer's dilemma.

A. COMMAND AUTHORITY, CONTRACT AUTHORITY, AND SUSPENSION AND DEBARMENT AUTHORITY

In this section, we define command authority, contract authority and suspension and debarment authority. All three of these authorities derive their power from unique legal sources and operate with different mandates. In order to understand the greater contracting-with-the-enemy problem, it is important to acknowledge the differences between these authorities.

1. Command and Contract Authority

Understanding the roles of contracting versus command authority and command relationships is a fundamental that must be understood because both military and legal consequences are possible if those lines are blurred when applying contracting processes. The difference between these two types of authority requires close coordination but yet must maintain a distinct separation. The Contract and Fiscal Law Department (2012), explained contract authority originates from the U.S. Constitution and explicitly states:

As a sovereign entity, the United States has inherent authority to contract to discharge governmental duties. This authority to contract is limited.

Specifically, a government contract must: 1. not be prohibited by law, and 2. be an appropriate exercise of governmental powers and duties. (p. 3)

Joint Publication (JP) 4-10, Operational Contract Support (DOD, 2014) summarizes contract versus command authority as:

Contracting authority is not the same as command authority. Contracting authority is the legal authority to enter into binding contracts and obligate funds on behalf of the U.S. Government (USG), while command authority includes the responsibility for effectively using available resources and planning the employment of, organizing, directing, coordinating, and controlling military forces for the accomplishment of assigned missions. Command authority does not include the authority to obligate funds or enter into contracts on behalf of the USG. These two different authorities should be closely coordinated to provide effective and efficient contracted support to the joint force.

Contracting authority is a unique aspect of contracting support in that only the contracting officer (KO) has the authority to obligate the USG. This authority to acquire supplies, services, and construction for the government comes from four sources: the U.S. Constitution; statutory authority; legislative appropriations; and Federal Acquisition Regulation (FAR) (including DOD and Military Department supplements). Contracting authority in the operational area flows from the U.S. Constitution to the Service/agency head, to the Service senior procurement executives (SPEs) to designated Head of Contract Activity (HCA), then either directly to the contracting officer or to the contracting officer through the Senior Contracting Official (SCO). This contracting authority is explicitly documented via the contracting officer's warrant. A warrant is the document that authorizes a contracting officer to award a contract to obligate the government to expend funds for contracted support requirements.

Combatant command (command authority), prescribed in Title 10, U.S.C., Section 164, includes the authority to perform functions involving organizing and employing commands and forces, assigning tasks and designating objectives, and giving authoritative direction over all aspects of an operation; it does not include authority to make binding contracts or modify existing contracts for the USG. It is also important to note that Geographical Combatant Commands (GCCs) do not have their own contracting authority. The GCCs direct and coordinate contingency contracting support through their subordinate Service components and combat support agencies (CSA). Additionally, command authority does not include the authority to direct contractor or contractor personnel actions outside the terms and conditions of their contract. (p. I-10)

Army Field Manual (FM) 4-92, Contracting Support Brigade (CSB), illustrates contracting authority within the Army under the new Army modular contracting structure (Department of the Army, 2010). The Assistant Secretary of the Army for Acquisition Logistics and Technology (ASA [ALT]) has appointed the Expeditionary Contracting Command (ECC) commander as the Head of Contracting Activity (HCA) for Army theater support contracting. With the consolidation of the Army's contingency contracting officers, operational commanders receive theater, contracting, planning and execution support by the Army Service Component Command (ASCC) aligned CSBs. CSB commanders receive their delegations of contracting authority from the ECC.

The Code of Federal Regulations (CFR) codifies this authority under Title 48, Chapter 1, of the Federal Acquisition Regulation. FAR § 1.601 precisely states that the authority and responsibility to contract for authorized supplies and services are vested in the agency head unless specifically prohibited by another provision of law (2015). The agency head may establish contracting activities and delegate broad authority to manage the agency's contracting functions to heads of such contracting activities. Contracts may be entered into and signed on behalf of the government only by contracting officers. In some agencies, a relatively small number of high-level officials are designated contracting officers solely by virtue of their positions. Contracting officers below the level of a head of a contracting activity shall be selected and appointed under FAR § 1.603 (2015).

The Defense Federal Acquisition Regulation Supplement (DFARS) (2015) defines the "Head of Agency" as the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force. Subject to the discretion of the Secretary of Defense, the Under Secretary of Defense (Acquisition, Technology, and Logistics), and the Director of Defense Procurement and Acquisition Policy, the directors of the defense agencies have been delegated authority to act as head of the agency for their respective agencies and identifies the Department of the Army's Senior Procurement Executive (SPE) as the ASA (ALT), which is also known as the Army Acquisition Executive (AAE) (DFARS, 2015, § 202.101). The Army Federal Acquisition Regulation (AFARS) § 5101.692 authorizes the HCA to assign a principal assistant

responsible for contracting (PARC) who is the senior staff official for a contracting activity responsible for all contracting functions (2015). The PARC could also be known as the senior contracting official (SCO) or chief of contracting office (COCO), dependent on the level of contracting support required, as illustrated by Figure 2. Lines of Authority and Figure 3. Legal Contract authority. The Army Federal Acquisition Regulation Supplement (AFARS) § 5101.692 authorizes the HCA to assign a Principal Assistant for Responsible for Contracting (PARC) who is the senior staff official for a contracting activity responsible for all contracting functions. The PARC could also be known as the SCO or Chief of Contracting Office (COCO) depending on the level of contracting support required and task organization. Figures 2 and 3 illustrate the lines of authority and legal contracting authority respectively.



Figure 2. Lines of Authority (from DCCHB, 2012, p. 29)

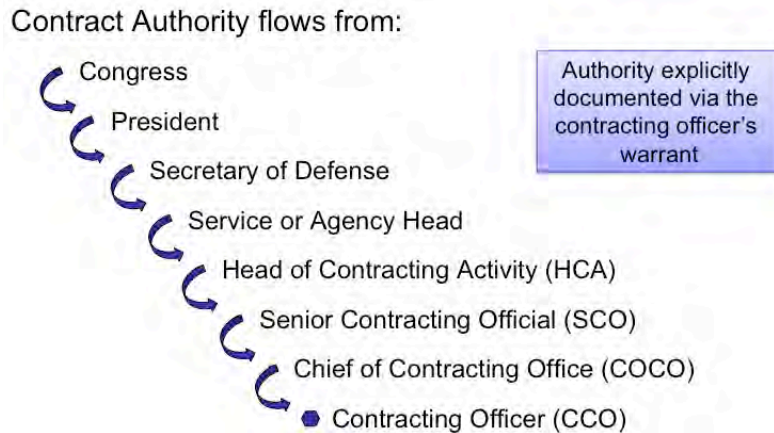


Figure 3. Legal Contract Authority (from DCCHB, 2012)

For example, in a large-scale contingency operation, JP 4-10, Operational Contract Support (DOD, 2014) demonstrates that, under Title 10 authority, the GCC may establish a subordinate joint command to accomplish mission tasks:

Since acquisition authority is not inherent to combatant command (command authority), the supported GCC coordinates the issuance of an HCA authority designation letter from the Service SPE of the Service component directed to form the building block for the Joint Theatre Support Contracting Command (JTSCC) SCO contracting authority to support the contingency as directed. [In which if the Army was designated as the Lead Service Component (LSC) for contracting, the Army's Contracting Support Brigade would be the building block for the JTSCC.] The GCC would normally pre-coordinate the HCA authority requirement with the appropriate Service SPE with the authority to become effective upon the standup of the JTSCC as directed in a execute order or fragmentary order (FRAGO).

The primary task of the JTSCC is to effectively and efficiently synchronize all theater support contracting under a single command and control (C2) structure and provide responsive contracting support to the Joint Force Command. The JTSCC would have a key secondary task to execute coordination authority over designated contracting activities supporting the Joint Task Force (JTF). (p. E-7)

Under a Joint Theater Support Contracting Command organization, the commanding officer serves as the HCA and delegate's contract warrant authority to subordinate SCOs and attached contingency contracting officers (CCOs) whom operate a Regional Contracting Center (RCC) and/or a Regional Contracting Office (RCO).

Operationally, SIGAR Audit 12-7 (2012) described the CENTCOM-JTSCC (C-JTSCC) formation and command relationship:

In April 2010, CENTCOM issued a fragmentary order to transition all current responsibilities with the Joint Contracting Command for Iraq and Afghanistan to C-JTSCC. Among other things, this order required C-JTSCC to execute centralized contracting oversight for all DOD contracts in Afghanistan, including contracts managed by other DOD contracting organizations as part of the Theater Business Clearance process. C-JTSCC is also required to directly manage certain contracts on behalf of U.S. Forces-Afghanistan and its subcommands, such as the Combined Security Transition Command-Afghanistan (CSTC-A). Further, C-JTSCC is required to establish and chair a Joint Contracting Support Board to ensure synchronization and unity of effort for contracting, including establishing contract visibility procedures and reports and coordinating the enforcement of contract management policies for external support and systems support. As executive agent for contracting for Afghanistan and to support C-JTSCC's expanded mission, the Assistant Secretary of the Army appointed the C-JTSCC Commander as the Head of the Contracting Activity for Afghanistan, which established C-JTSCC's overall responsibility for managing the contracting activity. In addition to its other responsibilities, C-JTSCC collects contracting data from other DOD contracting organizations operating in Afghanistan, including the USACE and the Air Force Center for Engineering and the Environment.

The C-JTSCC Commander designated the Senior Contracting Official-Afghanistan (SCO-A) to serve as the principal contracting authority of C-JTSCC's contracts. The SCO-A has direct responsibility over theater support contracting and manages contracts for DOD organizations in Afghanistan. The SCO-A has about 150 contracting officers in Afghanistan, who are responsible for entering into, administering, and terminating contracts. Many of these officers are deployed to 1 of 14 RCCs performing contracting services in various locations throughout Afghanistan. (pp. 2-3)

Contracting Officers are appointed by a warrant, using the Standard Form SF 1402 Certificate of Appointment, which provides the legal authorization to enter into binding contracts and obligate appropriated funds on behalf of the U.S. government. Contracting officers are appointed from a source of actual contract authority, by the Head of Agency or designee and not command authority. Military authority is exercised through the chain of command, and the contingency contracting officer (CCO) is subject to the rules of the Uniform Code of Military Justice. Contract authority is exercised

through the SPE, HCA, and SCO, and is subject to civilian statutes and regulations governing the acquisition of goods and services for the U.S. government.

Conflict could arise from when a military order by the GCC directs the contractor to perform outside the scope of his or her contract, which becomes an unauthorized obligation, or when a military order is given and the CCO must abide by that order, but deprives the contractor of his or her rights as given by the FAR. The contractor has the right to protest and challenge the CCO's actions according to standard business processes when contracting with the U.S. government. This protest may be subject to review by the Court of Federal Claims (COFC). If the COFC rules in favor of the contractor, the CCO must abide by that ruling, thus putting the CCO in contention with the GCC's military order, resulting in the possibility of the CCO being subject to UCMJ action, Article 92—Failure to obey an order or regulation. Challenges that resulted from specific contracting processes are examined by case review to determine their effects against the contracting officer. Our goal is to identify specific tools for the CCO to focus on in order to mitigate challenges and negative outcomes, and ultimately prevent future contracts with the enemy.

2. Suspension and Debarment Authority

The authority to suspend and debar contractors exists outside of both the contract and command channels of authority. FAR Subpart 9.4 provides wide latitude to federal agencies on suspension and debarment programs. Specifically, FAR § 9.402 states that “agencies are encouraged to establish methods and procedures for coordinating their debarment or suspension actions” (2015). Furthermore, the FAR defines suspension and debarment officials as agency heads or designees authorized by the agency head. There is some variety in how different federal agencies establish and execute their suspension and debarment programs. The Army, the agency responsible for suspension and debarments in Afghanistan, has designated the chief of the Procurement Fraud Branch of the Contract and Fiscal Law Division of the U.S. Army Legal Services Agency as their Suspension and Debarment Official (AFARS, 2015, § 5109.402). In the next section, we will further examine the criteria with which the SDO uses to make decisions.

B. STANDARD CONTRACTING PROCESSES

The primary means available to contracting officers in the fight against enemy-affiliated contractors are the responsibility determination and suspension, debarment, and ineligibility referrals. However, as discussed in the literature review, the reluctance of the Department of Defense to suspend and debar enemy-affiliated business entities has increased the importance of the responsibility determination to preclude Section 841 entities from competition. Unfortunately, the exclusive use of unfavorable responsibility determinations to prohibit businesses from competition may result in de facto debarment. Under circumstances where de facto debarment exists, the government is vulnerable to litigation from the aggrieved party. This section examines how contracting officers use the standard contracting processes authorized by the FAR to prohibit sources from competition. We pay special attention to which party the burden of proof rests with and what standards of evidence are required for each decision. Finally, we discuss the ramifications that arise when de facto debarment of a prospective contractor exists.

1. Responsibility Determination

The current policy of not pursuing suspension and debarment of Section 841 identified that contractors have increased the importance of the contracting officer's responsibility determination. FAR § 9.1, Contractor Qualifications, defines the criteria for what constitutes responsible contractors. It also provides guidance to contracting officers on how to execute the responsibility determination. FAR § 9.103 (2015) states that "purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only." FAR § 9.104-2 establishes general standards for what constitutes a responsible contractor (2015). While most of them are concerned with the ability of the potential source to fulfill the contract, some of the standards can be applied to contracting-with-the-enemy scenarios. Specifically, FAR § 9.104-1(c) requires contractors to "have a satisfactory performance record" and FAR § 9.104-1(d) requires contractors to "have a satisfactory record of integrity and business ethics" (2015). Thus, businesses that have a history of affiliation with enemy agents may not meet the general standards for responsibility under those two clauses.

FAR Part 9 goes on to discuss the relationship between prime contractors and their affiliates or sub-contractors. FAR § 9.104-3(c) states:

Affiliated concerns are normally considered separate entities in determining whether the concern that is to perform the contract meets the applicable standards for responsibility. However, the contracting officer shall consider the affiliates past performance and integrity when they may adversely affect the prospective contractor's responsibility. (2015)

In regards to subcontractors, FAR § 9.104-4(a) "generally, prospective prime contractors are responsible for determining the responsibility of their prospective subcontractors. Determinations of prospective subcontractor responsibility may affect the Government's determination of the prospective prime contractor's responsibility" (2015). FAR § 9.104-4(b) goes on to state:

When it is in the government's interest to do so, the contracting officer may directly determine a prospective subcontractor's responsibility (e.g., when the prospective contract involves medical supplies, urgent requirements, or substantial subcontracting). In this case, the same standards used to determine a prime contractor's responsibility shall be used by the Government to determine subcontractor responsibility. (2015)

The FAR's guidance on affiliated concerns and subcontractor responsibility is critically important for contracting officers operating in immature contingency environments where the business relationships between prime contractors and their affiliated concerns and sub-contractors may not be completely transparent. In those cases, the FAR gives contracting officers the ability to apply the same standards for prime contractors to their subcontractors and affiliates. Therefore, if a prime contractor cannot satisfactorily establish the responsibility of his or her subcontractors, the contracting officer can make a nonresponsibility determination for the prime.

Contracting officers affect a positive responsibility determination when they apply their signature to the contract award. When the contracting officer determines that a prospective contractor is in fact not responsible, the contracting officer is required to document the reasons why and file that information in the contract file (FAR , 2015, § 9.105-2). Note that the FAR does not specifically require the contracting officer to notify the prospective contractor of the nonresponsibility determination. Additionally,

prospective contractors are generally not granted due process to defend their interests when unfavorable responsibility determinations are made (Manuel, 2013). The extension of due process rights to prospective contractors during responsibility determinations has some very notable exceptions though. According to a 2013 report by the Congressional Research Service (CRS), “when nonresponsibility determinations are based upon concerns about contractors’ integrity, contractors are potentially entitled to due process because courts recognize contractors’ liberty interest in being able to challenge allegations about their integrity that could deprive them of their livelihood” (Manuel, 2013, p. 12). This is especially relevant to the contracting-with-the-enemy problem, as the satisfactory record of integrity and business ethics standard was previously identified as a standard that contracting officers could use to prevent Section 841 contractors from receiving an award. The CRS report goes on to state that, “contractors could potentially also be entitled to due process if repeated nonresponsibility determinations were made on the same basis—even when that basis is not integrity-related—if the determinations constitute *de facto* debarment” (Manuel, 2013). Therefore, repeat determinations of nonresponsibility for a prospective contractor, regardless of the reason for nonresponsibility, may result in the contractor litigating the U.S. government for deprivation of due process rights.

The use of the responsibility determination has several strengths that make it a powerful tool in the fight against enemy-affiliated contractors. First, the authority to make responsibility determinations rests with the contracting officers. This allows for decisions to be made in a relatively responsive manner in accordance with the specific circumstances of each contract solicitation. Next, nonresponsibility determinations typically do not warrant due process rights on behalf of the prospective contractor excluded from competition. Finally, and perhaps most importantly, the criteria for making responsibility determinations is broad enough to allow for significant discretion on behalf of the contracting officer. The contracting officer need only document the reason for the nonresponsibility determination in the contract file. For those reasons, the use of the responsibility determination is generally effective at precluding enemy-affiliated contractors from receiving contract awards on specific solicitations.

There are, however, some drawbacks to the exclusive use of the responsibility determination in the fight against enemy-affiliated contractors. Responsibility determinations are designed to preclude contractors from competition on just one specific contract award. They are not designed to repeatedly block prospective contractors from multiple contract awards. When used repeatedly, the government becomes vulnerable to litigation due to de facto debarment. Additionally, since the responsibility determination is only applicable to one specific contract award, it does not result in any long term punitive effects against the prospective contractor. Furthermore, the contracting officer incurs added work each time a Section 841-identified contractor competes for award, as the contracting officer must document and justify the reasons for the nonresponsibility determination. This may seem like a trivial burden, but in a contingency environment, contracting officer workloads can be significant, and added requirements to document repeated nonresponsibility determinations can adversely affect the Procurement Administrative Lead Time (PALT).

2. Suspension, Debarment, and Ineligibility

Suspension and debarment procedures are employed by federal agencies to prevent nonresponsible businesses from competing for contract award. The use of suspension and debarment procedures dates back to the Reagan administration and Executive Order 12549. In that order, Reagan directed that all “executive departments and agencies shall participate in a system for debarment and suspension” and that “debarment or suspension of a participant in a program by one agency shall have government-wide effect” (Executive Order No. 12549, 1986). Reagan’s actions created a system in which federal agencies could effectively punish non-responsible contractors by prohibiting them from future competition.

FAR § 9.4 provides guidance on the use of suspension, debarment, and ineligibility procedures. First, it is important to note the distinction in meaning between the three words. Suspension according to FAR § 2.101 “means action taken by a suspending official under 9.407 to disqualify a contractor temporarily from government contracting and government-approved subcontracting” (2015). In contrast, the FAR states

that debarment “means action taken by a debarring official under FAR § 9.406 to exclude a contractor from government contracting and government-approved subcontracting for a reasonable, specific period” (2015). The difference in the two terms is the time specified that the contractor is either suspended or debarred. Suspension is typically a temporary measure taken by a suspending official prior to a final debarment decision that will last for a defined period of time. Ineligibility refers to contractors that are otherwise ineligible for government contracts. FAR § 2.1 states that “ineligible means excluded from government contracting (and subcontracting, if appropriate) pursuant to statutory, executive order, or regulatory authority other than this regulation (48 CFR chapter 1) and its implementing and supplementing regulations” (2015). This means that contractors found in violation of an existing law are in effect ineligible to receive a contract award.

Suspension and debarment decisions are typically made by a suspension and debarring official. The SDO can either be the procuring agency head or “a designee authorized by the agency head to impose suspension” (FAR, 2015, § 9.403). In the Army’s case, the agency responsible for contracts in suspension and debarment decisions in Afghanistan, the SDO is a designated official appointed by The Judge Advocate General of the Army (AFARS, 2015, § 5109.403). The SDO official weighs the merits of a suspension and debarment recommendation prior to making a decision to suspend or debar a contract. Table 1 illustrates the various causes and evidentiary standards required to make either a suspension or debarment decision. It is important to note that there are distinctly different evidentiary requirements for suspension and debarment. Typically, suspension requires only adequate evidence of wrongdoing for the SDO to make an affirmative suspension decision. Debarment, on the other hand, is stricter and typically requires a conviction or preponderance of evidence of wrongdoing for an affirmative debarment decision. The evidentiary standards required for suspension and debarment decisions make them a more difficult tool to apply in the fight against enemy-affiliated contractors.

Table 1. Causes for Suspension and Debarment (from FAR, 2015, § 9.4)

Causes for Suspension		Causes for Debarment	
The suspending official may suspend a contractor upon adequate evidence of:	Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public contract or subcontract	The debarring official may debar a contractor upon conviction of or civil judgment for:	Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public contract or subcontract
	Violation of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws or receiving stolen property		Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen
	Violations of 41 U.S.C chapter 81, the Drug-Free Workplace		Violation of Federal or State antitrust statutes relating to the submission of offers
	Intentionally affixing a label bearing a "Made in America" inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States or its outlying areas, when the product was not made in the United States		Intentionally affixing a label bearing a "Made in America" inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States or its outlying areas, when the product was not made in the United States
	Commission of an unfair trade practice as defined in FAR 9.403		Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or
	Delinquent Federal taxes in an amount that exceeds \$3,000		Delinquent Federal taxes in an amount that exceeds \$3,000
	Knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence of	The debarring official may debar a contractor based upon a preponderance of the evidence for any of the following:	Knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence of
	Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code, Violation of the civil False Claims Act, Significant overpayment on the contract, other than overpayments resulting from contract financing		Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code, Violation of the civil False Claims Act, Significant overpayment(s) on the contract, other than overpayments resulting from contract financing
	Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor		Intentionally affixing a label bearing a "Made in America" inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States or its outlying areas, when the product was not made in the United States or its outlying
Additionally:	Indictment for any of the above offenses constitutes adequate evidence for suspension		Commission of an unfair trade practice as defined in FAR 9.403
	The suspending official may upon adequate evidence also suspend a contractor for any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor.		Violation of the terms of a Government contract or subcontract so serious as to justify debarment, such as willful failure to perform in accordance with the terms of one or more contracts or a history of failure to perform, or of unsatisfactory performance of, one or more contracts
			A history of failure to perform, or of unsatisfactory performance of, one or more contracts
			A contractor, based on a determination by the Secretary of Homeland Security or the Attorney General of the United States, that the contractor is not in compliance with Immigration and Nationality Act employment provisions
			A contractor or subcontractor based on any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor

3. Conclusion

The standard contract processes available to the contracting officer to prevent enemy-affiliated contractors from doing business with the U.S. government are the responsibility determination, suspension, debarment, and ineligibility. The responsibility determination is designed only to be implemented as a one-off decision for a specific contractor on a specific solicitation. When used repeatedly, responsibility determinations result in de facto debarment which contributes to an environment ripe for litigation against the U.S. government. Suspension, on the other hand, is a decision to prohibit a specific contractor from competing on contracts from any federal agency for a temporary period of time. Debarment is an even more serious determination and prohibits a contractor from competition for a fixed period of time. Since suspension and debarment are generally considered to be strict punishments for contractor malpractice there are greater evidentiary standards associated with the decision making process. While a responsibility determination can be made at the contracting officer level based on the contracting officer's discretion, suspension and debarment decisions are reserved for the agencies' SDO official. Suspension decisions typically require adequate evidence of wrongdoing, and debarment decisions usually require either a criminal conviction or a preponderance of evidence in order for the decisions to be made against a contractor.

In addition to the greater evidentiary burdens, suspension and debarment proceedings allow for due process on behalf of the contractor prior to the decision, whereas responsibility determinations only afford due process to the contractor after the decision is made. Table 2 depicts the differences between nonresponsibility determinations and debarment. The limitations imposed by the need to provide due process to contractors and meet strict evidentiary standards contribute to make suspension and debarment a difficult tool to apply to the contracting-with-the-enemy problem. The responsibility determination allows for greater flexibility on behalf of the contracting officer, yet if used repeatedly, can result in de facto debarment. Finally, ineligibility refers to contractors that are simply ineligible to compete for contract award due to a law, statute, executive order, or regulation.

Table 2. Comparison of Nonresponsibility Determinations and Debarment
(after Manuel, 2013)

Comparison of Nonresponsibility Determinations and Debarment		
	Nonresponsibility	Debarment
Decision Maker	Contracting Officer	Suspension and Debarment Official
Criteria	Adequate financial resources Ability to comply with delivery and performance schedule Satisfactory performance record Satisfactory record of integrity and business ethics Necessary organization and experience Necessary equipment and facilities Otherwise qualified and eligible	Fraud or Criminal Offenses in obtaining or performing a public contract or subcontract Violations of federal or state antitrust laws Embezzlement, theft, forgery, bribery, etc. Intentionally misusing "Made in America" designation Other offenses indicating a lack of business integrity or honesty that seriously affect the present responsibility of a contractor
Duration	Single contract award	Fixed time proportionate to the offense (generally not more than three years)
Application	Applies to companies that have not previously had government contracts, as well as current and prior government contractors	Generally applied to current government contractors, although potentially applicable to prospective or prior contractors
Due Process	Generally after decision	Prior to decision, but with mitigation
Review of Agency Determinations	Responsibility determinations may generally be challenged with GAO only when any special standards are not met or other "serious concerns" are raised	Exclusion determinations are generally not protestable with GAO

C. MILITARY DETERMINATIONS OF ENEMY STATUS

In this section, we analyze how the U.S. government identifies and determines the statuses of enemy combatants and businesses. The purpose of this section is to compare the legal standards used to identify enemy personnel with the standards used by the DOD to identify enemy businesses in Afghanistan. For the purposes of this paper, we refer to the standards used to target personnel as military targeting and the standards used to identify enemy-affiliated contractors as vendor vetting.

1. Military Targeting

Military targeting policy is a wide area of study with roots in the Law of War, Geneva Convention, and Hague Treaty. The U.S. Army's *Operational Law Handbook* describes the legal basis for the use of military force. Within that handbook, the Army JAG provides a justification for the preemptive use of military force.

In the 2002 National Security Strategy (NSS), the U.S. Government took a step toward what some view as a significant expansion of use of force doctrine from anticipatory self-defense to preemption. This position was reinforced in the 2006 NSS, which reaffirmed the doctrine of preemptive self-defense against “rogue states and terrorists” who pose a threat to the United States based on their expressed desire to acquire and use weapons of mass destruction. The “Bush Doctrine” of preemption re-casted the right of anticipatory self-defense based on a different understanding of imminence. Thus, the NSS stated, “We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries.” It concluded: “The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack.” The 2010 NSS, however, suggests a possible movement away from the Bush Doctrine, as the Obama Administration declares in the NSS that, “while the use of force is sometimes necessary, [the United States] will exhaust other options before war whenever [it] can, and [will] carefully weigh the costs and risks of action versus the costs and risks of inaction.” Moreover, according to the 2010 NSS, “when force is necessary ... [the United States] will seek broad international support, working with such institutions as NATO and the U.N. Security Council.” Nevertheless, the Obama Administration maintains that “the United States must reserve the right to act unilaterally if necessary to defend our nation and our interests, yet we will also seek to adhere to standards that govern the use of force.” (International and Operational Law Department, 2014, pp. 6–7)

The analysis of the U.S. government’s policies towards preemptive military targeting is useful to our study because it bears some similarities to the challenge of preventing contracting with the enemy. In the case of preemptive use of force, the government justifies preemptive military action when national security is threatened. In contrast, contracting officers must also use preemptive actions to prevent enemy-affiliated contractors from doing business with the government. In order to compare the legal standards affecting the contracting officer’s preemptive actions, we will analyze the U.S. government’s current policy on preemptive lethal targeting of U.S. citizen’s affiliated with enemy terrorist organizations overseas. Therefore, we limit our scope within this section to current doctrine used by the Obama administration to target U.S. civilians actively engaged in terrorist activities that threaten national security. In 2013, President Obama explained U.S. policy on the subject to an audience at the National Defense University.

When a U.S. citizen goes abroad to wage war against America—and is actively plotting to kill U.S. citizens; and when neither the United States, nor our partners are in a position to capture him before he carries out a plot—his citizenship should no more serve as a shield than a sniper shooting down on an innocent crowd should be protected from a SWAT team. (Obama, 2013)

A declassified Department of Justice (DOJ) white paper from 2011 described the legal interpretations used by the Obama administration to target U.S. civilians actively working within al-Qa'ida abroad. The paper concluded that the lethal targeting of U.S. citizens is justified if the following three conditions are met (DOJ, 2011, p. 1):

- An informed, high-level official of the U.S. government has determined that the targeted individual poses an imminent threat of violent attack against the United States.
- Capture is infeasible, and the United States continues to monitor whether capture becomes feasible.
- The operation would be conducted in a manner consistent with applicable law of war principles.

In reaching that conclusion, the DOJ weighed the constitutional rights of the individual to be targeted against the threat posed to national security as a result of that person's actions. The white paper argued that the person's interest in his or her own life "must be balanced against the United States' interest in forestalling the threat of violence and death to other Americans" (DOJ, 2011, p. 2). Therefore, a U.S. citizen identified as a senior member of al-Qa'ida or an affiliate organization is not entitled to due process rights.

The white paper also addressed the evidentiary standards required to determine if the U.S. citizen in question poses an "imminent" threat to national security. DOJ argues that clear evidence linking the U.S. citizen to an imminent violent attack against the United States is not necessary nor feasible to acquire in most cases. "Delaying action against individuals continually planning to kill Americans until some theoretical end stage of the planning for a particular plot would create an unacceptably high risk that the action would fail and that American casualties would result" (DOJ, 2011, p. 7). Furthermore, DOJ asserted "that an individual poses an 'imminent threat' of violent attack against the United States where he is an operational leader of al-Qaida or an

associated force and is personally and continually involved in planning terrorist attacks against the United States” (DOJ, 2011, p.8). Therefore, U.S. government policy justifies the lethal targeting of U.S. citizens who are senior operational leaders of enemy terrorist organizations on that basis alone.

Lethal targeting of U.S. citizens abroad is a difficult decision to make and is subject to grave consequences. For that reason, it is a very controversial topic in the court of opinion. For the purposes of this study, we are only interested in the legal principles in effect for analogous use to the contracting-with-the-enemy problem. Those legal principles were tested in the U.S. District Court for the District of Columbia when the family of Anwar Al-Aulaqi filed suit against members of the Obama Administration. The plaintiffs asserted that Al-Aulaqi’s constitutional rights were violated when he was killed by a U.S. military drone strike in Yemen. The court dismissed the law suit in favor of the defendants, finding that the father of Al-Aulaqi “did not have standing to assert his son’s constitutional rights ... and that at least some of the issues raised [in the lawsuit] were non-justiciable political questions” (*Al-Aulaq et al. v. Panetta et al.*, 2014, p.4). That ruling by the district court, effectively upheld the principles outlined in the DOJ white paper justifying the lethal targeting of U.S. citizens involved as senior operational leaders of al-Qa’ida and its affiliates.

2. Vendor Vetting

The Department of Defense established the vendor vetting program in response to Section 841 of the FY 2012 NDAA. Section 841 directed the DOD to establish a program within CENTCOM that would

use available intelligence to review persons and entities who receive United States funds through contracts, grants, and cooperative agreements performed in the USCENTCOM theater of operations and identify any such persons and entities who are actively supporting an insurgency or otherwise actively opposing United States or coalition forces in a contingency operation” (Public Law 112-81, 2011, § 841).

Vendor vetting is the means by which CENTCOM implements that directive. Two years, Section 831 of the FY 2014 NDAA expanded the language of the previous law to include all overseas major commands. That guidance was codified and disseminated in a class deviation to the Defense Federal Acquisition Regulation Supplement (DFARS) by the Director for Defense Procurement and Acquisition Policy, Richard Ginman. That class deviation directs all overseas Combatant Commanders (COCOM) to establish a program for identifying contractors actively opposing the United States and then notify their respective HCA. The HCA, without power of delegation is then authorized to take the following actions:

- Prohibit, limit, or otherwise place restrictions on the award of any DOD contracts to such identified persons or entities.
- Terminate for default any DOD contracts when the HCA determined that the contractor failed to exercise due diligence to ensure that none of the funds received under the contract are provided directly or indirectly to such identified person or entity.
- Void, in whole or in part, any DOD contract that provided funds to such identified person or entity. (Ginman, 2014).

In Afghanistan, USCENTCOM has established a two-phase approach to execute the guidance found in Section 841 of the FY 2012 NDAA and its successors. The first phase consists of the identification of contractors affiliated with enemy insurgent forces. First, TF 2010, an entity within U.S. Forces–Afghanistan (USFOR-A), conducts an intelligence assessment of current and potential contractors within Afghanistan. Based on the results of that assessment, TF 2010 develops individual targeting packages for each contractor suspected of supporting adversarial forces (SIGAR, 2013). Those targeting packages are then routed through the International Security and Assistance Force Joint Command in Afghanistan for concurrence. After that, they are forwarded to the USCENTCOM commanding general for final approval. If the USCENTCOM commander determines that the individual contractor is in fact supporting the enemy, then he or she forwards that status determination to the HCA for further action in phase two of the vendor vetting process.

In phase two, the HCA is responsible for identifying any contracts between its organization and Section 841–designated entities. If the HCA identifies that a current contract with a Section 841 entity exists, they are authorized, but not required, to restrict award, terminate for default, or void in part or whole the contract. The SIGAR conducted a survey of the various HCAs and heads of agency responsible for executing phase two in order to determine its effectiveness. Seven of the 11 respondents surveyed by the SIGAR indicated that they had no formal process for complying with the Section 841 provisions. One HCA in particular suggested that their agency only conducts “an informal poll of its contracting officers” to determine if a Section 841 individual was involved in one of their contracts (SIGAR, 2013, p. 14). Fortunately, the SIGAR went on to indicate that many of the agencies involved were in the process of drafting formalized procedures for managing Section 841 identifications. Figure 4 illustrates the flow of information during phase one and two of the vendor vetting process.

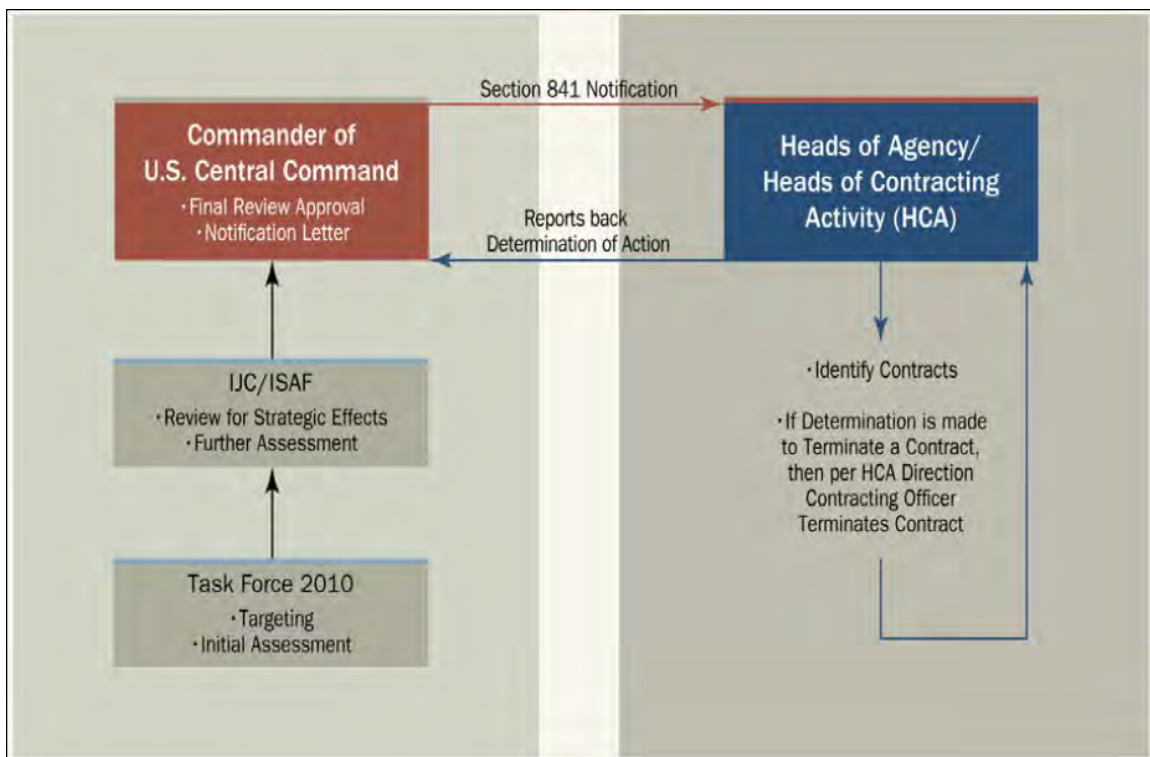


Figure 4. Vendor Vetting Process (from SIGAR, 2013, p. 12)

The provisions pertaining to contracting with the enemy in the FY 2012 NDAA and FY 2014 NDAA do not establish evidentiary standards for the identification of enemy-affiliated business. Determining what exactly constitutes behavior that affiliates a contractor with the enemy is left up to TF 2010 and the respective combatant commander. The NDAAs also do not dictate whether or not those contractors identified as being affiliated with the enemy should be granted due process rights. The notion that contractors identified as being affiliated with the enemy should be granted due process rights has been argued in the U.S. Court of Federal claims, though (*MG Altus Apache Company v. United States*, 2013). That case and others like it are analyzed in the case law analysis section of this chapter.

3. Conclusion

In this section, we analyzed the standards the U.S. government uses for lethal targeting and the processes by which the DOD identifies enemy-affiliated business entities in Afghanistan. From this analysis, we concluded that the legal standards used to apply nonresponsibility determinations are to make a debarment decision are in some ways stricter than the standards used to lethally target a U.S. citizen operating with al-Qa'ida overseas. This dichotomy is most noticeable in the evidentiary standards and due process requirements needed to make the decisions. For instance, debarment generally requires a conviction for a crime or a preponderance of evidence in favor of misconduct for the debarring official to make a decision. In contrast, the DOJ has argued that the government only needs to prove that a U.S. citizen poses an imminent threat to the United States in order to identify him or her for lethal targeting. Additionally, the DOJ argues against allowing due process for citizens identified for lethal targeting, whereas companies identified for debarment are allowed due process. Table 3 depicts the differences in criteria, due process standards, and evidentiary standards for nonresponsibility determinations, debarment, and lethal targeting of U.S. citizens. These legal standards make the fight against contracting with the enemy more complex than it has to be, as the contracting officer must use the standard contract processes available to him or her to make a decision based on military necessity.

Table 3. Comparison of Nonresponsibility Determination, Debarment, and Lethal Targeting of U.S. Citizens (after DOJ, 2013; Manuel, 2013; FAR, 2015, § 9.4)

Comparison of Nonresponsibility Determination, Debarment, and Lethal Targeting of US Citizens			
	Nonresponsibility	Debarment	Lethal Targeting of US Citizen
Decision Maker	Contracting Officer	Suspension and Debarment Official	High Level US Government Official
Criteria	Adequate financial resources Ability to comply with delivery and performance schedule Satisfactory performance record Satisfactory record of integrity and business ethics Necessary organization and experience Necessary equipment and facilities Otherwise qualified and eligible	Fraud or Criminal Offenses in obtaining or performing a public contract or subcontract Violations of federal or state antitrust laws Embezzlement, theft, forgery, bribery, etc. Intentionally misusing "Made in America" designation Other offenses indicating a lack of business integrity or honesty that seriously affect the present responsibility of a contractor	Senior operational leader of Al-Qa'ida or an affiliate organization who poses an imminent threat of violent attack against the United States, where capture is infeasible
Due Process	Generally after decision	Prior to decision, but with mitigation	No
Evidentiary Standards	Contracting Officer Discretion, subject to review by GAO or Federal Courts	Conviction or preponderance of evidence suggesting wrongdoing	Must prove citizen in question poses an imminent threat United States

D. CASE LAW

Current laws allow for the termination of a current contract once a status determination is obtained. However, there is no law preventing the enemy-affiliated contractor (KTR) from competing for future contracts unless a formal hearing for suspension and debarment is conducted and sustained. It has been directed by the Secretary of the Army that each status-determined business entity as an enemy is entitled to due process from suspension and debarment. When cases are forwarded to the agency suspension and debarment officer for review, the majority of them are thrown out due to lack of evidence. This allows for the KTR to compete for future contracts. The possibility exists that a KTR may sue the KO for de facto debarment when a contracting officer (KO) uses their discretion to determine a responsibility status based on past performance and excludes the KTR from competition because of a prior status determination of being affiliated with the enemy.

The purpose of these legal case reviews is to examine contracting issues arising from surrounding circumstances and the court's rulings as solutions to those problems, and possible ramifications for the KO. Information gathered from the review can be used as a foundation to justify a KO's future decision as rational and reasonable or reveal challenges the KO may face when implementing contract management tools. Topics of interest include established precedence, the court's decision to acknowledge a liberty interest and due process rights for businesses that have been determined affiliated with the enemy, the KO's discretionary decision-making authority, military status-determinations, responsibility determinations, past performance evaluations, and rights to classified information. Significant questions are:

- What decision is being made?
- Who is responsible for making the decision?
- What standard of evidence is necessary to make the decision?
- Upon whom does the burden of proof reside?
- What risk is inherent in the decision(s)?

The review format consists of identifying the topic the case presents, placing it into context by describing the nature of legal proceedings, and describing the issue (the

legal standard or rule), the application of the rule, the conclusion or ruling by the judicial official, and a summary.

- Topic: Relevant contractual topics key pertaining to the legal case
- Context: Nature of legal proceedings
- Issue: The issue is the challenge or legal issue presented by the fact pattern of the surrounding circumstances
- Rule: The rule consists of several elements which, when met, dictate a legal outcome or constitute a legal standard
- Application: Applying the elements of rule to the facts in order to prove or disprove the legal question at issue
- Conclusion: Resolution of the legal issue or challenge

1. *Al-Aulaqi et al. v. Panetta et al.*, 2014

a. *Topic*

Status determination; Fifth Amendment rights; Due process

An overview of *Al-Aulaqi et al. v. Panetta et al.* (2014) is summarized in Table 4 for quick reference.

Table 4. Overview of *Al-Aulaqi et al. v. Panetta et al.* (2014)

<i>Al-Aulaqi et al. vs Panetta et al.</i> (2014)		
	Plaintiff	Defendant
Issue	Denied Fifth Amendment rights; Targeted killings took place outside the context of armed conflict that relied on vague legal standards, a closed executive process, and evidence never presented to the courts therefore denying Fifth Amendment Rights.	Court lacks jurisdiction due to the complaint raising a nonjusticiable political question.
Rule	Nonjusticiable political question doctrine; Fifth Amendment—Due Process Clause	
Application	The court finds the actions of U.S. officials targeting U.S. citizens abroad without due process as justiciable, thus establishing their jurisdiction for review. U.S. citizens are entitled to constitutional protections even when abroad. <i>Ex parte Quirin</i> states citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance, and direction enter the United States with the intent of hostile acts are enemy belligerents with the meaning of the Hague Convention and the law of war.	
Decision	The court does not conceive that the plaintiff was entitled to notice and a hearing or that official actions were deliberately conducted indifferent to the plaintiffs Fifth Amendment rights. Defendant's motion to dismiss was granted.	

b. Context

Anwar Al-Aulaqi was a leader within al-Qa'ida Arabian Peninsula (AQAP) and the United States determined him to be an enemy and a threat to national security. The United States launched a drone strike in Yemen on September 30, 2011, which killed Al-Aulaqi and a passenger with him named Samir Khan. Both were U.S. citizens. The United States launched another drone strike in Yemen two weeks later that killed Abdulraham Al-Aulaqi, Anwar's son, although he was not a target. Nasser Al-Aulaqi, the father of Anwar and grandfather of Abdulraham, and Sarah Khan, the mother of Samir, claim U.S. officials who authorized the drone strikes deprived the deceased of their Fifth Amendment rights. Nassir and Sarah represent the deceased and bring suit against the United States (specifically former Secretary of Defense Panetta, former Joint Special Operations Commander Admiral McRaven). This case was heard at the U.S. District court for the District of Columbia in 2014.

c. Issue

The plaintiffs claim that the deceased were denied Fifth Amendment rights, specifically substantive and procedural due process rights, Fourth Amendment rights to be free from unreasonable seizures, the deprivation under the Constitution's Bill of Attainder clause and U.S. officials should be held accountable and personally liable for their actions and roles in authorizing drone strikes against targeted personnel that are U.S. citizens. The plaintiffs allege "that the targeted killings took place in Yemen, which was outside the context of armed conflict and that these killings relied on vague legal standards, a closed executive process, and evidence never presented to the courts" (*Al-Aulaqi v. Panetta*, 2014). The United States responds with a move to dismiss because the court lacks jurisdiction due to the complaint raising a nonjusticiable political question, special factors preclude implying a cause of action under a cited case, and that the defendants are entitled to qualified immunity (*Al-Aulaqi v. Panetta*, 2014). Pointedly, we look at the plaintiff's deprivation of due process claim as it is relevant to our contracting-with-the-enemy research.

d. Rule

Fifth Amendment—Due Process Clause: The guarantee of due process for all citizens requires the government to respect all rights, guarantees, and protections afforded by the U.S. Constitution and all applicable statutes before the government can deprive a person of life, liberty, or property. Due process essentially guarantees that a party will receive a fundamentally fair, orderly, and just judicial proceeding. While the Fifth Amendment only applies to the federal government, the identical text in the Fourteenth Amendment explicitly applies this due process requirement to the states as well. Procedural due process ensures fundamental fairness by guaranteeing a party the right to be heard, ensures that the parties receive proper notification throughout the litigation, and ensures that the adjudicating court has the appropriate jurisdiction to render a judgment. Substantive due process requires all governmental intrusions into fundamental rights and liberties be fair and reasonable and in furtherance of a legitimate governmental interest as protecting those rights so fundamental as to be implicit in the concept of ordered liberty (LII, 2015).

Nonjusticiable Political Question/Political Question Doctrine is a ruling by the Supreme Court in which federal courts should not hear cases that are directly involved with issues that the U.S. Constitution makes the sole responsibility of the other government branches to make.

e. Application

Article III, Section 1 of the Constitution establishing judicial powers of U.S. Courts, establishes courts as having limited jurisdiction, and states that Article III does not encompass judicial supervision over the president's designation as enemies against the United States. Consequently, the status determination challenge becomes a nonjusticiable political question. *Japan Whaling Association v. American Cetacean Society* (1986) rules that the political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. *Baker v. Carr* (1962) ruled that the conduct of foreign relations is the

sole responsibility of the executive branch and any issue or challenge in the way that the executive branch is using its constitutional power presents a political question. The U.S. Constitution authorizes the president to act as the Commander-in-Chief and direct the performance of military functions by the U.S. military in which within these functions are tasks that are important during the conduct of war. Although the court recognized:

powers granted to the Executive and Congress to wage war and provide for national security does not give them *carte blanche* to deprive a U.S. citizen of his life without due process and without any judicial review. The interest in avoiding the erroneous deprivation of one's life is uniquely compelling. The Bill of Rights was passed to protect individuals from an over-reaching government, and this Court cannot refuse to provide an independent legal analysis. (*Al-Aulaqi v. Panetta*, 2014)

The court finds the actions of U.S. officials targeting U.S. citizens abroad without due process as justiciable, thus establishing their jurisdiction for review. *Reid v. Covert* (1957) holds that U.S. citizens are entitled to constitutional protections even when abroad. The court holds this ruling and states that because the deceased were killed in Yemen, their basic legal rights still stood under the U.S. Constitution.

Due process protects an individual from arbitrary exercise of governmental power. A plaintiff must establish a protected interest in life, liberty, or property to argue a procedural due process claim and show that government officials knowingly deprived the individual of that interest without notice and nor an opportunity to be heard (*Daniels v. Williams*, 1986). A plaintiff must assert his or her constitutional rights were disregarded in such a way that the government official was deliberately indifferent and that the official's conduct shocks the conscience, "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience" (*Estate of Phillips v. Dist. of Columbia*, 2006). Although, *Hamdi v. Rumsfeld* ruled that the use of military force against those individuals, even U.S. citizens, who fight against the U.S. military is permissible under the Constitution. *Ex parte Quirin* states:

citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance, and direction enter the United States with the intent of hostile acts are enemy belligerents with the meaning of the Hague Convention and the law of war.

Davidson v. Cannon (1986) ruled that a due process claim is not valid if prompted by the lack of due care by an official causing inadvertent injury or damage to life, liberty, or property and the *County of Sacramento et al. v. Lewis et al.* (1998) stated the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process, therefore, the court ruled that Samir Khan and Abdulrahman Al-Aulaqi's due process claim are dismissed.

The plaintiffs continued to argue Anwar Al-Aulaqi's deprivation of due process and Anwar's execution was without charge, indictment, nor prosecution. The plaintiffs also claim that the drone strike that killed Anwar was with deliberate indifference to his constitutional rights to life. The court does not conceive that Anwar was entitled to notice and a hearing or that the drone strike shocked the conscience:

The fact is that Anwar Al-Aulaqi was an active and exceedingly dangerous enemy of the United States, irrespective of his distance, location, and citizenship. As evidenced by his participation in the Christmas Day attack, Anwar Al-Aulaqi was able to persuade, direct, and wage war against the United States from his location in Yemen, *i.e.*, without being present on an official battlefield or in a "hot" war zone. Defendants, top military and intelligence officials, acted against Anwar Al-Aulaqi, a notorious AQAP leader, as authorized by the AUMF. Special factors—including separation of powers, national security, and the risk of interfering with military decisions—preclude the extension of a *Bivens* remedy to such cases. (*Al-Aulaqi v. Panetta et al.*, 2014)

f. Conclusion

The U.S. District Court Judge grants the defendant's motion to dismiss for the reasons previously mentioned.

g. Summary

(1) What decision is being made?

- Are U.S. citizens entitled to constitutional protection rights abroad, even if they have been determined an enemy?
- Was there a deprivation of due process, which is a constitutional protection?

(2) Who is responsible for making the decision?

The Executive branch has the constitutional authority to make such decisions when weighed against national security interests. It is the court's reasoning to review such challenges if a claim becomes a nonjusticiable political question whereas the court lacks jurisdiction to review executive and military decisions, or if such decisions are judicially discoverable.

(3) What standard of evidence is necessary to make the decision?

The manner in which what standards of evidence are used when making an enemy determination is not judicially discoverable as not to interfere with foreign policy or military actions. Such determinations by the Executive branch and top military officials are trusted to be in good faith as to protect the United States and national interests.

(4) Upon whom does the burden of proof reside?

In this case, with a post-deprivation claim of due process, the claimant has the burden of proof to demonstrate the unfair and arbitrary acts of governments that result in a shock to the conscience. The government only has a burden of persuasion to the court that the claim is a nonjusticiable political question whereas the court has no jurisdiction, and no Bivens claim of special factors is applicable because the claimant was determined to be an enemy.

(5) What risk is inherent in the decision(s)?

The Court recognizes the possibility of a plausible claim and the opportunity to be heard. The Court establishes a forum, post-facto, to present a case. Enemy of the state or not, the court recognizes the challenge and will hear the argument and ultimately decide the legitimacy of the claim and rule.

2. *James Filor et al. v. The United States, 1867*

a. *Topic*

Contract authority; Contracts with the enemy; Status determination

An overview of *James Filor et al. v. The United States* (1867) is summarized in Table 5 below for quick reference.

Table 5. Overview of *James Filor et al. v. The United States* (1867)

<i>James Filor et al. v. The United States</i> (1867)		
	Plaintiff	Defendant
Issue	Entitled to rent by the U.S. government which was agreed upon and signed by way of a lease. Key West, FL, was not in a state of rebellion or insurrection, was a loyal part of the United States and Constitutional laws were to be upheld.	Challenged the validity and legality of the transfer of deed. The recipient were was not authorized under his power of attorney to act on behalf of a status determined enemy on the sale of property or exercise monetary discretion, therefore the lease was void.
Rule	Presidential proclamation, August 16, 1861 - Commercial business between the citizens of states in insurrection and citizens of the United States is unlawful.	
Application	The deed transferred to the plaintiffs by Asa Tift through means of power of attorney by Charles Tift is void under the rule of law which prohibits contracts between enemies. Charles Tift was executing the sale of the property to the plaintiffs on behalf of Asa Tift who was determined to be a confederate. It is as if Asa Tift, a known enemy, had executed the sale himself to the plaintiffs, thus making the contract void and effectively making the plaintiffs have no authority to execute a contract with the U.S. government. No license or exception was ever granted by the government to enter into a contract on these terms. Therefore, the commanding officer of and quartermaster had no authority to	
Decision	The deed to the petitioners was void, as a contract between enemies, and that the U.S. military was not a legal authorized party to enter into a contract in terms of lease for property to which the title was invalid by circumstances known to the officers at the time the lease was made. Subsequently, the United States are not parties to the lease, nor liable.	

b. Context

The case was presented in the Court of Federal Claims in 1867. This case sets the precedent that all contracts with the enemy are void. The plaintiffs, Filor and Curry, seek a monetary remedy from a lease for “Tift’s Wharf and Warehouse” which was agreed upon with Lieutenant J. S. Gibbs, acting quartermaster, for \$6,000 payable quarterly. The plaintiffs, before the lease, obtained the land from Asa. F. Tift, through his attorney, Charles Tift, December 27, 1861. Asa F. Tift appointed his brother with power to sell his property on May 21, 1861, before entering behind confederate lines and supporting the Confederacy during the Civil War. Asa Tift, who was identified as an active enemy, was trying to protect his property through the aid of Charles Tift, as a loyal citizen of the Union, from confiscation or military seizure.

No money or rent was ever given to the plaintiffs under a lease. The plaintiffs continually submitted the lease to the quartermaster general, but was never approved nor disapproved. After several attempts and a refusal to pay by the quartermaster general, the plaintiffs filed a claim.

c. Issue

- Was the transfer of deed between Charles Tift and the plaintiffs void or voidable by law?
- Was the quartermaster authorized to bind the U.S. government as a party in this contract?

The plaintiffs claim they are entitled to rent by the U.S. government which was agreed upon and signed by way of a lease. Filor and Curry have a complete, good, and perfect deed for the property. Key West, Florida, was not in a state of rebellion or insurrection. It was a loyal part of the United States and Constitutional laws were upheld. Payment to Charles Tift for the sale of the property to the plaintiffs was deposited in a Havana bank account. No money was ever received by Asa Tift during the war. It was the intent of Charles Tift and the plaintiffs to avoid giving aid to the enemy. The judge advocate general and quartermaster general challenged the validity and legality of the transfer of deed by Charles Tift. Charles Tift was not authorized under his power of attorney to act on behalf of Asa Tift on the sale of property or exercise monetary discretion because Asa Tift was determined to be an enemy when he left for occupation within rebel lines and supported the Confederacy.

d. Rule

On August 16, 1861, the President proclaimed:

The inhabitants of the States of Georgia, South Carolina, Virginia, North Carolina, Tennessee, Alabama, Louisiana, Texas, Arkansas, Mississippi, and Florida, in a state of insurrection against the United States; and that all commercial intercourse between the same and the inhabitants thereof, with the exceptions aforesaid, and the citizens of other States and other parts of the United States, is unlawful, and will remain unlawful until such insurrection shall cease or has been suppressed. (*James Filor et al. v. The United States*, 1867)

Commercial intercourse, or commercial business, is unlawful between any persons determined to be the enemy and the U.S. government. Commercial intercourse extends to contracts. Therefore, it is law that contracting with the enemy is illegal.

e. Application

- Asa Tift was a citizen of Key West who owned the property known as “Tift’s wharf.”
- Asa Tift was a member of the Florida convention that passed the ordinance of secession from the Union on January 9, 1861.
- May 21, 1861: Charles Tift was granted power of attorney by Asa Tift to authorize him to sell any part of his property.
- December 28, 1861: Charles Tift recorded the sale of the property and transfer of deed to the plaintiffs.
- January 24, 1862: The plaintiffs leased the wharf to the United States.
- The commanding officer at Key West and the quartermaster entered into the lease with full knowledge that the plaintiffs received their deed from Asa Tift who joined the confederacy, and in effect, was at war with the United States, deeming him an enemy.

In accordance with the August 16, 1861, proclamation, the deed transferred to the plaintiffs by Asa Tift through means of power of attorney by Charles Tift is void under the rule of law which prohibits contracts between enemies. Within the context of a principal–agent relationship, Asa Tift, determined to be a confederate, was *qui facit per alium, facit per se* when Charles Tift was executing the sale of the property to the plaintiffs December 28, 1861. It is as if Asa Tift, a known enemy, had executed the sale himself to the plaintiffs, thus making the contract void and effectively making the plaintiffs have no authority to execute a contract with the U.S. government over Tift’s wharf.

This calls into question the authority to bind the United States as a party to this lease. If the United States is obligated, then the United States is subject to the rules and laws pertaining to leases. “A cardinal rule is that the lessee cannot, and the court cannot, put in issue the title of the lessor, for his claim does not depend on his title, but on the contract of lease” (*James Filor et al. v. The United States*, 1867). Then the claim becomes a remedy to Asa Tift for the occupation of the property upon agreed lease terms, and not the legality of the deed possessor.

There is no rule of law preventing a sovereign state from contracting with the enemy if a license is granted by reasonable exception. When the commanding officer and quartermaster entered into a lease, aware of Asa Tift operating with free will as an enemy against the United States, no license or exception was ever granted by the government to enter into a contract on these terms. Therefore, the commanding officer of Key West and quartermaster had no authority to bind the United States.

f. Conclusion

It is the opinion of the court by Loring,

And we decide as points of law—1. That the deed from A. F. Tift to the petitioners was void, as a contract between enemies, and 2. That the officers of the quartermasters' department at Key West were not authorized to hire for the United States premises, the title to which was invalid by circumstances known to the officers at the time the lease was made, and that the United States are not parties to the lease, nor liable thereupon. (*Filor et al. v. U.S.*, 1867)

g. Summary

(1) What decision is being made?

- Is a contract void or voidable?
- What legal authorization is present to bind a party into a contract?
- Is the agent authorized to bind the principal into a contract?

(2) Who is responsible for making the decision?

In this case, the contract between the sale of the property between Asa Tift and the plaintiffs is void because it is unlawful to enter into contracts with the enemy, and therefore any contract entered into by the U.S. government and the plaintiffs is void. The quartermaster was not authorized to contractually bind the United States, nor is it lawful to bind the U.S. government into a contract with the enemy unless a license or protection is granted.

(3) What standard of evidence is necessary to make a decision?

It is clear and convincing evidence that the law of agency, which establishes the legal authority for the agency to act on behalf of the principal, is apparent. It is implicit

that an agent authorized to act on behalf of its principal has authorization to bind the principal into a contract with the government. It is this principal–agent relationship that is based on the Latin maxim *Qui facit per alium, facit per se*, which means “he who acts through another is deemed in law to do it himself.” It was also, through preponderance of evidence, that Asa F. Tift sustained allegiance to the state of Florida in its secession from the Union, left, joined the confederacy, and in effect, was at war with the United States, deeming Asa Tift an enemy.

(4) Upon whom does the burden of proof reside?

The claimant, or plaintiff, had to establish facts showing that the lease was signed in accordance with law. Filor and Curry could not dispute the fact that Asa F. Tift was determined to be a confederate, therefore outlawing any commercial business actions associated with Tift or the transfer of deed became void in accordance with the presidential proclamations.

(5) What risk is inherent in the decision(s)?

If the KO determines the contract to be void or voidable and terminates the contract, the KTR can protest the legality of the binding contract and appeal the KO’s decision to seek remediation. If the Court finds the claim to be sustained and the contract to be upheld, a breach of contract could be awarded to the contractor.

3. *MG Altus Apache Company v. The United States, 2013*

a. *Topic*

KO responsibility determination; KO discretion; KTR past performance; Status determination; Vendor vetting; De facto debarment; Due process; Liberty interest

An overview of *MG Altus Apache Company v. The United States* (2013) is summarized in Table 6 below for quick reference.

Table 6. Overview of *MG Altus Apache Company v. United States* (2013)

<i>MG Altus Apache Company v. United States</i> (2013)		
	Plaintiff	Defendant
Issue	Challenged the determination of the KO's nonresponsibility decision as arbitrary and claimed the vendor vetting assessment was unreasonable because a rejected rating disqualifies any KTR from entering into a contract with the U.S. government. The resulting de facto debarment stripped the plaintiff of any due process.	The KO listed areas of concern when notifying MG AA that regarded an ongoing responsibility evaluation with an opportunity to provide corrective action. The response was not sufficient to correct or prevent future occurrences of deficient performance. The KO was not obligated to notify MG AA of a rejected status resulting from a vendor vetting assessment, which was used as the basis for a nonresponsible KTR determination.
Rule	Fifth Amendment—Due Process Clause; FAR Contractor Qualifications; CENTCOM FRAGO 10-330, and International Security Assistance Force Joint Command (IJC) FRAGO 606-210	
Application	The U.S. government infringed on Fifth Amendment protection against unfair treatment in legal processes; this in turn evoked procedural due process rights protection from arbitrary denial of life, liberty, or property. COFC recognized this infringement by the U.S. government and the right to be heard, however, due process is flexible and calls for such procedural protections as the particular situation demands. Basic elements of due process such as notice, grounds, opportunity to respond and be heard, are subject to essential national security considerations.	
Decision	The plaintiff's request for permanent injunction was denied. The KO's nonresponsibility determination as a whole was rational. The evidence on which the KO relied on was sufficient to support a conclusion that their judgment was reasonable.	

b. Context

Mesopotamia Group Altus Apache (MG AA) Company protested the KO's nonresponsibility determination and exclusion from competition in an award for a National Afghan Trucking (NAT) contract for transportation services in Afghanistan. MG AA alleged the Army relied upon a classified vendor vetting rating scheme as the basis for a nonresponsibility determination. This illegally applied a de facto debarment standard against them, excluding them from competition. MG AA alleged the vendor vetting's program procedures were imprudent and therefore were blacklisted from receiving the award. MG AA requested injunctive relief from the vendor vetting assessment and responsibility determination.

c. Issue

MG AA challenged the determination of the KO's nonresponsibility decision as arbitrary and claimed the vendor vetting assessment was unreasonable because a rejected rating disqualifies any KTR from entering into a contract with the U.S. government. The

resulting de facto debarment stripped MG AA of any due process. When de facto debarment is a result of U.S. government infringement, the deprivation of a KTR's constitutionally protected liberty interest evokes procedural due process rights under the Fifth Amendment.

MG Altus Apache Co. is a joint venture consisting of Mesopotamia Group Services Limited (MG), Altus Supply and Services (Altus), and Apache Defense, LLC (Apache). MG is an American-owned company operating exclusively within Afghanistan. MG is identified as the Lead Member responsible for program, contract, accounting, and financial management on behalf of the joint venture. In response to the NAT contract solicitation (February 22, 2011), MG AA submitted a proposal. The solicitation stated offerors are evaluated for responsibility in accordance with FAR § 9.1 (Contractor Qualifications—Responsible Prospective Contractors). MG was in a joint venture with Ettefaq-Meliat-Hai-Afghan Consulting, Inc. (EMA) under the Host Nation Trucking (HNT) contract for transportation services within Afghanistan. MG AA listed the HNT contract as a reference for evaluation.

On July 25, 2011, the Combined Joint Staff for Counter-Intelligence and Human Intelligence Operations (CJ2X) determined MG AA vendor's rating. CJ2X, a military intelligence unit, is charged with assessing and evaluating vendors in accordance with the vendor vetting program. On July 29, 2011, the Army eliminated all offerors whose proposals failed either the technical or price requirements and forwarded the acceptable proposals for responsibility determinations. On July 30, 2011, the KO informed MG AA of its responsibility evaluation and identified several areas of concern in relation to MG EMA's past performance of the HNT contract. The areas of concern listed MG EMA's noncompliance with In-transit Visibility (TTV) contract requirements, failure to meet Private Security Contractor (PSC) Arming Requirements, forged Transportation Movement Requests (TMRs), and withholding of contract payments for failed missions, canceled no-pay missions, pilferage, and back charges. The notice also cited letters of concern and cure notices issued to MG EMA on five separate dates. On August 1, 2011, MG AA responded to the KO's responsibility evaluation notice, outlining "relevant circumstances, mitigating factors, and corrective actions specific to each area of concern"

(*MG Altus Apache Company v. United States*, 2013). On August 10, 2011, MG AA was informed that it had been eliminated from competition because the MG AA had been determined nonresponsible.

d. Rule

FAR § 9.103 (Contractor Qualifications–Policy)

(a) Purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only.

(b) No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility. In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility.

FAR § 9.104-1 (Contractor Qualifications – General Standards)

To be determined responsible, a prospective contractor must

(a) Have adequate financial resources to perform the contract, or the ability to obtain them;

(b) Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;

(c) Have a satisfactory performance record. A prospective contractor shall not be determined responsible or nonresponsible solely on the basis of a lack of relevant performance history;

(d) Have a satisfactory record of integrity and business ethics;

(e) Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors).

(f) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them; and

(g) Be otherwise qualified and eligible to receive an award under applicable laws and regulations.

FAR § 9.104-3(b) (Contractor Qualifications – Application of Standards)

Satisfactory performance record—A prospective contractor that is or recently has been seriously deficient in contract performance shall be presumed to be nonresponsible, unless the contracting officer determines that the circumstances were properly beyond the contractor’s control, or that the contractor has taken appropriate corrective action. Past failure to apply sufficient tenacity and perseverance to perform acceptably is strong evidence of nonresponsibility. Failure to meet the quality requirements of the contract is a significant factor to consider in determining satisfactory performance. The contracting officer shall consider the number of contracts involved and the extent of deficient performance in each contract when making this determination.

e. Application

It is important to understand the application of FAR § 9.104-1 and the justification of the KO’s decision to determine MG AA as nonresponsible first before applying the vendor vetting procedures and rules. By finding the KO’s responsibility determination to be reasonable, it [the KO’s discretion to determine responsibility] eliminates MG AA as an apparent successful offeror. By eliminating MG AA as an apparent successful offeror, the KO was not required to inform MG AA of its vendor vetting rating that excluded it from competition in accordance with CENTCOM Contracting Command Acquisition Instruction, CENTCOM FRAGO 10-330, and International Security Assistance Force Joint Command (IJC) FRAGO 606-210 that outlines vendor vetting program and procedures.

A KO shall determine a prospective contractor non responsible if there is an “absence of information clearly indicating that the prospective contractor is responsible” (FAR § 9-103(b)). The KO listed seven areas of concern when notifying MG AA that regarded an ongoing responsibility evaluation with an opportunity to provide corrective action. MG AA responded with the required “relevant circumstances, mitigating factors, and corrective actions specific to each area of concern” (*MG Altus Apache Company v. United States*, 2013), but the KO determined the response was not sufficient to correct or prevent future occurrences of deficient performance. It is in this response the KTR, MG AA, bears the burden of proof to demonstrate to the KO they are capable and responsible in accordance with FAR § 9-104.1 Contractor Qualifications–General Standards. The KO

found “absence of information” to satisfy these requirements and therefore determined MG AA nonresponsible.

MG AA claims the KO improperly considered past performance when evaluating MG AA’s responsibility for the NAT procurement. MG AA asserts that any negative performance issues under the HNT contract were the fault of EMA. MG and EMA operated as a joint venture under the HNT contract. MG AA submitted its experience under the HNT as evidence under the MG EMA joint venture for transportation services in Afghanistan, but pushes total blame on EMA. MG AA disclaimed responsibility for MG EMA’s HNT performance, stating that “all of the negative issues identified in third party reports were solely EMA issues according to the terms of the MG EMA Joint Venture agreement and the actual activities of the two parties during performance of the HNT contract” (*MG Altus Apache Company v. United States*, 2013).

The court reviewed MG EMA’s HNT proposal to MG AA’s proposal and found under both joint venture agreements MG’s responsibilities were the same. MG AA’s vice president of corporate development, whom was proposing to be the program manager, was the same program manager under the MG EMA joint venture. MG AA’s reliance on MG EMA’s performance to justify their capability and using MG EMA as a reference in the NAT procurement, it is reasonable for the KO to consider MG EMA’s past performance evaluation when determining MG AA’s responsibility. The HNT and NAT contract considerably have the same mission requirements. MG operated under a joint venture during the HNT contract and proposed a joint venture for the NAT contract under which the would perform in the same functional role as a lead member and program manager. “As the Comptroller General has recognized, in evaluating past performance, the key consideration is whether the experience evaluated reasonably can be considered predictive of the offeror’s performance under the contemplated contract” (*MG Altus Apache Company v. United States*, 2013).

FAR § 9.601(1) defines contractor team arrangement as an arrangement in which two or more companies form a partnership or joint venture to act as a potential prime contractor. The COFC defines as a general rule that “each member of a joint venture has the authority to act for and bind the enterprise, absent agreement to the contrary” (*MG*

Altus Apache Company v. United States, 2013). The court reasoned based on analogy that MG and EMA had the authority to act for and bind each other under the MG EMA joint venture agreement. “Thus, CJ2X’s attribution of EMA’s conduct to the MG EMA joint venture was, on this record, consistent with law. So too, the contracting officer’s reliance on CJ2X’s conclusion was reasonable” (*MG Altus Apache Company v. United States*, 2013). “The Comptroller General has recognized, information in investigative reports may be used as the basis of a nonresponsibility determination” (*MG Altus Apache Company v. United States*, 2013). MG AA continued to contend that the KO’s reliability on CJ2X’s vendor vetting assessment was irrational, arbitrary, and capricious because CJ2X’s conclusions were outdated, constituted de facto debarment, and deprived MG AA of due process.

On November 5, 2010, CENTCOM Contracting Command issued an Acquisition Instruction directing all KOs to vet non-United States vendors operating in Afghanistan as ordered by CENTCOM FRAGO 10-330 and IJC FRAGO 606-210.

Non-U.S. vendors must submit location and identification information within the Joint Contingency Contracting System (JCCS). The KO then submits a vetting request to JCCS. CJ2X assess the vendor by risk to mission and classified that risk as moderate, significant, high, or extremely high. A classification, or rating, of high or extremely high required a validation panel to approve or reject the vendor by considering the intelligence assessment and other relevant information. A rejected vendor is ineligible to receive contract awards in Afghanistan and the intelligence assessment is forwarded to the requesting activity. An Exception to Policy (ETP) waiver is an option the requesting activity can submit. This is called a Rejected Contractor Waiver and is submitted by the Battle Space Owner, not the KO. The waiver process must be complete within 30 days after notification by CJ2X and must be signed by the Deputy Commander for United States Forces in Afghanistan (USFOR-A).

Notification to the vendor is only required if the vendor would otherwise be the apparent successful offeror and the vendor requested a debriefing. If a vendor is an apparent successful offeror the KO could only inform him or her in writing you were determined to be ineligible for award of subject contract by United States Forces—Afghanistan/Iraq. You may submit a written request for reconsideration of this determination to USFOR-A/USF-I, through the Contracting Officer, within 60 calendar days of this notification, otherwise, the KO is not to mention their ineligibility. CJ2X attempts to re-vet every 180 days if possible. CJ2X’s vendor assessment

and classification, or rating, is upheld for a period of one year. (*MG Altus Apache Company v. United States*, 2013)

On July 25, 2011, CJ2X classified MG AA as rejected. The KO inquired if the requiring activity would be seeking a waiver. The requiring activity declined on August 3, 2011. Therefore, MG AA was ineligible for any U.S. government contracts in Afghanistan and was the basis, as required, for the KO's determination of nonresponsibility on August 10, 2011. MG AA claimed the KO's reliability on CJ2X's intelligence report and assessment was irrational due to inaccuracy and outdated Intel. COFC cited precedence that allowed the KO to rely on assurances from another agencies and it is not arbitrary and capricious for the KO to trust military intelligence that was two years old.

MG AA further claims that the vendor vetting process is illegal, as it deprived MG AA of due process. The status determination of rejected excluded MG AA from contract awards without notice or an opportunity to respond. Not only is MG AA prohibited from the NAT procurement award, but from all potential U.S. government contracts in Afghanistan by way of de facto debarment and therefore was blacklisted by how the KO acted in bad faith and unfair dealing.

The court began to establish the reason it [COFC] to hear, discuss, and remedy a claim of de facto debarment. The court establishes jurisdiction under 28 U.S.C.

to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. (FAR § 1491(b)(1))

Where a claim of de facto debarment as a result of the vender vetting program deprived MG AA of due process violating their constitutional rights. Because MG AA's vendor vetting rating was the basis for the KO's responsibility evaluation under the NAT procurement, the court entertains the "constitutional challenge to that vetting process predicated on a denial of due process is fair game" (*MG Altus Apache Company v. United States*, 2013).

The court acknowledged the CJ2X's rating of rejected operated as de facto debarment, wherein, the U.S. government prohibits procurement awards to the KTR and in effect threatens the KTR's livelihood and breaching the KTR's Constitutional right to liberty. MG AA claims the de facto debarment violates the procedures of FAR § 9.4 governing the debarment, suspension, and ineligibility of contractors, by not allowing them an "opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents" (FAR § 9.406(3) Debarment Procedures), the U.S. government infringes on Fifth Amendment protection against unfair treatment in legal processes; this in turn evokes procedural due process rights protection from arbitrary denial of life, liberty, or property. COFC recognizes this infringement by the U.S. government and the right to be heard. "Due process normally requires that a contractor receive notice of the charges impugning its integrity and an opportunity to be heard" (*MG Altus Apache Company v. United States*, 2013).

However, the court ascertains due process requirements are dependent on given circumstances and "Due process is flexible and calls for such procedural protections as the particular situation demands and basic elements of due process such as notice, grounds, opportunity to respond and be heard are subject to essential national security considerations" (*MG Altus Apache Company v. United States*, 2013).

Therefore the court reasonably judged by

providing a contractor either notice of its ineligible status or an opportunity to present rebuttal evidence, requiring traditional due process in the CJ2X rating process would adversely affect national security. In the environment of a warzone when the required notice would necessarily disclose classified material and could compromise national security, normal due process requirements must give way to national security concerns. Not only would affording due process here require disclosure of classified information and endanger military intelligence sources, it would provide information to entities that pose a potential threat to the United States, thereby placing United States forces and operations at risk. (*MG Altus Apache Company v. United States*, 2013)

MG AA was not deprived due process rights. The KO was not obligated to notify MG AA of a rejected status because the KO determined MG AA not be the only apparent successful offeror based on past performance factors under the MG EMA joint venture

HNT contract. It is reasonable that the vendor vetting process further demonstrated MG AA's lack of ethics and integrity. MG AA failed to show clear and convincing evidence that it was arbitrarily excluded from competition or that the KO acted in bad faith and demonstrated a "systematic effort by the procuring agency to reject all of the bidder's contract bids" (*MG Altus Apache Company v. United States*, 2013). MG AA was given an opportunity to respond and did not contest CJ2X's assessment as inaccurate, nor did MG AA justify proper corrective actions to prevent future performance deficiencies. It is not that MG AA was blacklisted from contract awards, but it was found nonresponsible by its lack of information as per FAR § 9.104(b)(3) Application of Standards: "Past failure to apply sufficient tenacity and perseverance to perform acceptably is strong evidence of nonresponsibility."

f. Conclusion

The Judge ruled in favor of the KO. The plaintiff's motion for judgment on Permanent Injunction was denied. "The FAR does not require that each of the contracting officer's conclusions be independently sufficient on its own to support a finding of nonresponsibility. Rather, the contracting officer's nonresponsibility determination as a whole must be rational (*MG Altus Apache Company v. United States*, 2013). "The Court notes that, on the whole, the evidence on which the contracting officer relied to find MG AA nonresponsible was sufficient to support a conclusion that the contracting officer's judgment call was reasonable" (*MG Altus Apache Company v. United States*, 2013).

g. Summary

(1) What decision is being made?

- Was the KO's responsibility determination arbitrary?
- Is relying on a partner's past performance from a joint venture unreasonable when evaluating the KTR's past performance?
- Was using the vendor vetting assessment rating as the basis for the responsibility determination injudicious?
- Does the vendor vetting procedures operate as a de facto debarment process, thus denying due process rights?

(2) Who is responsible for making the decision?

In a protest case, the Court of Federal Claims (COFC) has jurisdiction to review the Department of the Army's (the agency) procurement decision under the standards articulated within the Administrative Procedure Act (APA).

The COFC is authorized to set aside any agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and illegal. An agency action is arbitrary and capricious under the APA when the agency entirely fails to consider an important aspect of the problem, offers an explanation for its decision that runs counter to the evidence before the agency, or the decision is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. Under the Administrative Procedure Act (APA), an agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. (*MG Altus Apache Company v. United States*, 2013)

(3) What standard of evidence is necessary to make a decision?

MG AA failed to show clear and convincing evidence that it was arbitrarily excluded from competition or that the KO acted in bad faith. The KO demonstrated with a preponderance of evidence that past performance systemic behavior patterns resulted in significant doubt of responsibility for future services, according to FAR § 9.104(b)(3) Application of Standards: "Past failure to apply sufficient tenacity and perseverance to perform acceptably is strong evidence of nonresponsibility" (2015).

(4) Upon whom does the burden of proof reside?

The plaintiff has the burden of establishing that the responsibility determination was arbitrary and capricious. The protestor also bears the burden of proof in demonstrating an agency procurement process error. A protester alleging bad faith bears a heavy burden of proof to establish its claim with clear and convincing evidence (requiring the contractor to make a showing of clear and convincing evidence to support the claim that the agency did not act in good faith (*MG Altus Apache Company v. United States*, 2013)). MG AA did not contest CJ2X's assessment in several areas, nor did MG AA refute the KO's determination that CJ2X's assessment substantiates MG AA's lack of ethics and integrity. MG AA failed to show evidence for which the KO relied on CJ2X's the intelligence assessment as inaccurate.

(5) What risk is inherent in this decision?

COFC reasons that a claim of de facto debarment as grounds for protest can be presented before the court for relief or remedy even if the KTR is determined “high risk,” therefore giving the enemy potential due process rights and a liberty interest to enter into U.S. government contracts. This would consistently call into question the KO’s discretion and authority. Under the Administrative Procedure Act (APA), the KO must articulate a satisfactory explanation for his action, including a rational connection between the facts found and the choice made (5 U.S.C.A. § 706) relevant to the contractor qualifications and standards outlined in FAR § 9.104-1. This could potentially become an overall burdensome process on the shoulders of the KO every time a contract is terminated or make a nonresponsibility determination based upon the vendor vetting assessment and rating.

It is advisable that the KO demonstrate a logical and rational connection between the facts found and the decisions it makes. The KO must provide a potential contractor a formal notice and an opportunity to respond with corrective actions, unless otherwise ordered in the interests of national security. The KO must consider if the experience evaluated can reasonably be considered predictive of the KTR’s performance under the solicited contract when making a determination. Or, in the absence of information, a clear indication that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility. “Contracting officers are generally given wide discretion in making responsibility determinations and in determining the amount of information that is required to make a responsibility determination; when such decisions have a rational basis and are supported by the record, they will be upheld” (*MG Altus Apache Company v. United States*, 2013), but if the protestor presents clear and convincing evidence supporting his or her claim and the COFC determines their evidence as factual matter, the COFC would recognize the protestor as being prejudiced by such standard business process errors and grant the protestor relief or remedy in which the KO is legally obligated to abide by.

4. *El-Shiffa Pharmaceutical Industries Co. & Idris v. The United States, 2004*

a. *Topic*

Status designation; Fifth Amendment rights

An overview of *El-Shiffa Pharmaceutical Industries Co. & Idris v. The United States* (2004) is summarized in Table 7 for quick reference.

Table 7. Overview of *El-Shiffa Pharmaceutical Industries Co. & Idris v. The United States* (2004)

<i>El-Shiffa Pharmaceutical Industries Co. & Idris v. The United States (2004)</i>		
	Appellant	Defendant
Issue	Challenged the government's designation of a pharmaceutical plant in Sudan, Africa as enemy property. Advocated to the court that the president relied on flawed intelligence for targeting regarding the production of chemical weapons and any links to al-Qaeda. El Shiffa et al. claim they are entitled to relief in the form of just compensation based upon the Takings Clause.	Appellants had no legal standing to sue as nonresident aliens; There is no substantial voluntary connection between the United States the appellants, nor their property; and There is no legal reciprocity with Sudan. The Takings Clause does not apply to nonresident aliens, nor their property that is located beyond U.S. territory on foreign soil, because there is no substantial voluntary connection with the United States.
Rule	Fifth Amendment – Takings Clause; Reciprocity Act; Nonjusticiable Political Question Doctrine	
Application	Due to the nature of the surrounding circumstances, this Taking's claim is a nonjusticiable political question and upholds that the Takings Clause does not protect the interests of nonresident aliens whose property is located in a foreign country unless they can demonstrate substantial voluntary connections to the United States. Defining the standard of evidence as convincing or compelling in order to make an enemy designation is up to the president to determine, not the courts.	
Decision	Providing additional due process to contest an enemy designation is not worth risking the possibility that such decisions the President makes in waging war successfully overseas will analogously be subjected to review by the federal courts. The appellant's failed to demonstrate a substantial voluntary connection to the United States, just compensation does not apply to enemy property, and, therefore, their request of just compensation was denied.	

b. *Context*

This case was presented in the Court of Federal Claims in 2004 as an appeal to a previous decision. Collective appellants El-Shiffa Pharmaceutical Industries Company and Salah El Din Ahmed Mohammed Idris brought a suit against the United States seeking just compensation of \$50 million dollars for the destruction of the pharmaceutical manufacturing plant located in Sudan, Africa by U.S. Armed Forces. The appellants

allege that El-Shiffa pharmaceutical manufacturing company was the largest in Sudan and it was supplying drugs to help the poor.

Terrorist networks linked to Osama bin Laden and al-Qaeda bombed U.S. Embassies in Nairobi, Kenya, and Tanzania on August 7, 1998. On August 20, 1998, President Clinton ordered strikes in Sudan to disrupt the terrorist networks and destroy a plant known to manufacture chemical weapons. The president stated the following in his letter to Congress:

The United States had acted in self-defense, and that the strikes were a necessary and proportionate response to the imminent threat of further terrorist attacks against U.S. personnel and facilities. These strikes were intended to prevent and deter additional attacks by a clearly identified terrorist threat. The targets were selected because they served to facilitate directly the efforts of terrorists specifically identified with attacks on U.S. personnel and facilities and posed a continuing threat to U.S. lives. The President added that he ordered the strikes pursuant to his constitutional authority to conduct U.S. foreign relations and as Commander and Chief Executive. (*El-Shiffa Pharmaceutical Industries Co. & Idris v. The United States*, 2004)

El-Shifa and Mr. Idris denied the asserted accusations by the Clinton Administration regarding the production of chemical weapons in the pharmaceutical plant and any links to al-Qaeda. The U.S. government responded with a request to dismiss the case because the appellants had no legal standing to sue as nonresident aliens; there is no substantial voluntary connection between the United States, the appellants, nor their property; and there is no legal reciprocity with Sudan.

c. Issue

The appellants claim they are entitled to relief in the form of just compensation based upon the Takings Clause:

The Takings Clause imposes an absolute and unqualified restriction upon government conduct... [that] is derived from a theory of 'natural law' and based upon a natural right to private property which is universal in nature, not dependent on citizenship, and a fundamental principle of international law. (*El-Shiffa et al. v. The United States*, 2004)

The U.S. government argues that the Takings Clause does not apply to nonresident aliens, nor their property that is located beyond U.S. territory on foreign soil, because there is no substantial voluntary connection with the United States.

d. Rule

The Takings Clause, Fifth Amendment of the U.S. Constitution requires the government to pay just compensation at fair market value for private property that the federal government acquires for use. If the government appropriates property without paying just compensation, a plaintiff may sue in the Court of Federal Claims on a takings claim regardless of whether the government's conduct leading to the taking was wrongful, and regardless of whether the plaintiff could have challenged the government's conduct as wrongful in another forum. (*El-Shiffa et al. v. The United States*, 2004)

The Reciprocity Act, 28 U.S.C. § 2502 (2014), states Citizens or subjects of any foreign government which accords to citizens of the United States the right to prosecute claims against their government in its courts may sue the United States in the United States Court of Federal Claims if the subject matter of the suit is otherwise within such court's jurisdiction.

The Enemy Property Doctrine acknowledges that enemy-declared property and the destruction of such property does not require the U.S. government to make reparations or just compensation.

The Nonjusticiable Political Question/Political Question Doctrine is a ruling by the Supreme Court in which that federal courts should not hear cases that are directly involved with issues that the U.S. Constitution makes the sole responsibility of the other government branches.

e. Application

The court realizes that the text of the Takings Clause does not define what private property is, nor if the property must be located within the United States, or if only American citizens may receive just compensation. Both parties agree that a takings claim can be valid if the property is not physically located within the United States (*Turney v. U.S.* (1953) rejects the argument that Takings Clause did not apply to property located in

a foreign country) and a claimant does not have to be a U.S. citizen or a resident alien for a valid takings claim if the property is within the United States. The disagreement is in the facts, whereas the claimant in this case is a nonresident alien with property on foreign soil in which there is no substantial voluntary connection with the United States. A Supreme Court's decision (*U.S. v. Verdugo-Urquidez*, 1990) established that aliens are entitled to receive constitutional protections when they are within U.S. territories and have developed substantial connections. However, *Turney v. U.S.* (1953) binds the U.S. government, as the Takings Clause protects the property interests of nonresident aliens abroad even if no substantial connection can be demonstrated. The court realizes that due to the nature of the surrounding circumstances, the taking's claim is a nonjusticiable political question and is not required to uphold the Turney ruling of 1953, but upholds the Supreme Court's ruling of *Verdugo-Urquidez*, (1990) and determines "that the Takings Clause does not protect the interests of nonresident aliens whose property is located in a foreign country unless they can demonstrate substantial voluntary connections to the United States" (*El-Shiffa et al. v. The United States*, 2004). The appellants did not contend but conceded to the fact that just compensation does not apply to enemy property, therefore they challenged the government's designation of the pharmaceutical plant as enemy property and advocated to the court that the president relied on flawed intelligence for targeting.

The court reflects on Article III, Section 1 of the Constitution establishing judicial powers of U.S. Courts and states that Article III does not encompass judicial supervision over the president's designation as enemies against the United States. Consequently, the status determination challenge becomes a nonjusticiable political question. *Baker v. Carr*, (1962) ruled that the conduct of foreign relations is the sole responsibility of the executive branch and any issue or challenge in the way that the executive branch is using its constitutional power presents a political question. The U.S. Constitution authorizes the president to act as the Commander-in-Chief and direct the performance of military functions by the U.S. military in which within these functions are tasks that are important during the conduct of war. The court states,

In our view, the President's power to wage war must also necessarily include the power to make extraterritorial enemy designations because such designations are also an important incident to the conduct of war and cannot envision how a military commander, much less the Commander-in-Chief, could wage war successfully if he did not have the inherent power to decide what to target. We are of the opinion that the federal courts have no role in setting even minimal standards by which the President, or his commanders, are to measure the veracity of intelligence gathered with the aim of determining which assets, located beyond the shores of the United States, belong to the Nation's friends and which belong to its enemies. (*El-Shiffa et al. v. The United States*, 2004)

The court adds some definition to the measure of veracity as defining the standard of evidence as convincing or compelling in order to make an enemy designation, which is up to the president to determine, not the courts. Moreover, the Supreme Court states,

It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home.

The appellants' desire for judicial review of the President's decision to target the Plant would most surely give way to the specter of field commanders vetting before the civil courts the intelligence on which they rely in selecting targets for destruction while simultaneously dealing with the exigencies of waging war on the battlefield. For all of these reasons, we think the Constitution, in its text and by its structure, commits to the President the power to make enemy designations such as the one made regarding the appellants' Plant. (*El-Shiffa et al. v. The United States*, 2004)

f. Conclusion

The court describes a Mathews test in which the Supreme Court uses to balance the interests of the U.S. government to that of an individual. The Mathews test ensures a citizen is not deprived of life, liberty, or property without due process.

The application of the Mathews test would require us to balance the appellants' strong interest in not being deprived of their property interest in the Plant without due process against the President's interest and capacity to wage war overseas. In other words, we would have to consider whether providing the appellants additional process to contest the single enemy property designation at bar is worth risking the possibility that the

panoply of such decisions the President makes in waging war successfully overseas will likewise be subjected to review in the federal courts. In short, we think the question answers itself. The balance, in this case, must necessarily tip in the President's favor. (*El-Shiffa et al. v. The United States*, 2004)

g. Summary

(1) What decision is being made?

- Are nonresident aliens entitled to Fifth Amendment protection rights?
- Are enemy designations by the president or military combatant commander's under presidential authority subject to judicial review during time of war?

(2) Who is responsible for making the decision?

The president is authorized by his constitutional war powers to make an enemy designation decision. This decision is extended to the military geographic combatant commanders through the National Command Authority that refers to the lawful source of military orders.

(3) What standard of evidence is necessary to make the decision?

The court describes the standard of evidence as compelling or convincing for an enemy designation, but because of the political question doctrine, the challenge to the designation is not under judicial review because the president acted upon his constitutional war powers to defend the nation.

(4) Upon whom does the burden of proof reside?

The burden of proof resides on the claimant or appellant in this case to prove there is a substantial voluntary connection, and that the countries of Sudan practices legal reciprocity with equal treatment without undue influence (such as Islamic fundamental laws) with the United States to have a valid taking's claim. Nonetheless, all evidence is void by an enemy designation.

(5) What risk is inherent in the decision(s)?

The court acknowledges the appellant's challenges, even under enemy status. Although the U.S. government's interests outweigh the appellant's interests in this case,

the court still provides an opportunity to be heard and evaluated as to extending fifth amendment rights to the private party or not.

5. *Ralls Corporation v. Committee on Foreign Investment in the United States, 2014*

a. *Topic*

Due process; Access to classified information; Enemy designation

An overview of *Ralls Corporation v. Committee on Foreign Investment in the United States (CFIUS)* (2014) is summarized in Table 8 for quick reference.

Table 8. Overview of *Ralls Corporation v. CFIUS* (2014)

<i>Ralls Corporation v. CFIUS (2014)</i>		
	Plaintiff	Defendant
Issue	Protested CFIUS's investigation and Presidential Order violated the Due Process clause of the Fifth Amendment. Ralls was never provided the opportunity to review and respond to the evidence in which CFIUS and the president used to make a determination. Ralls was never informed of the gravity of concern by CFIUS nor was any information ever disclosed to Ralls in order to mitigate those concerns to the U.S. government.	The Ralls acquisition threatened national security interests due to certain locations of the wind farms being in military restricted areas. The U.S. government argued that Ralls's due process challenge is a nonjusticiable political question. Ralls received adequate process with the opportunity to present evidence in Ralls's favor under which Ralls was notified that its transaction was subject to review. Because of the national security interests by the executive branch, no further process was due.
Rule	Nonjusticiable political question doctrine; Fifth Amendment—Due Process Clause	
Application	The judiciary branch does not have neither the aptitude, facilities, nor responsibility to review national security decisions made by the executive branch, therefore, to what standards of evidence or findings to determine if an entity threatens national security becomes a nonjusticiable political question.	
	Ralls possessed state law property interests when it acquired the companies and their assets before CFIUS's investigation whereas valid contracts are considered property under the Fifth Amendment. Because state law recognizes the property interest, the protections of the Due Process Clause should be provided. The question becomes how much process is due?	
	Due process is not a technical conception with a fixed content unrelated to time but flexible and calls for such procedural protections as the particular situation demands. The court makes a strong point that due process does not require disclosure of classified information supporting official action. Due process requires that an affected party be informed of the official	
Decision	The Presidential Order deprived Ralls of their constitutionally protected property interests without due process of law. Because Ralls had the opportunity to present evidence to CFIUS and to interact with it, then, is plainly not enough to satisfy due process because Ralls never had the opportunity to tailor its submission to the U.S. government's concerns or rebut the factual premises underlying the President's action.	

b. Context

This case was heard on an appeal May 5, 2014 in the Court of Appeals, District of Columbia Circuit Court. The appellant, Ralls Corporation, purchased four wind farm companies that were American owned to develop wind farms in north-central Oregon. Ralls is an American company incorporated in Delaware and headquartered in Georgia but owned by two Chinese nationals, Dawei Duan and Jialiang Wu, who assert that

Ralls's is in the business of identifying U.S. opportunities for the construction of wind farms in which the wind turbines of Sany Electric [Chinese windmill manufacture with direct ties to Duan and Wu], its affiliate, can be used and their quality and reliability demonstrated to the U.S. wind industry in comparison to competitor products. (*Ralls Corporation v. CFIUS*, 2014)

The acquisition of the four American wind farm companies came under scrutiny from the Committee on Foreign Investment in the United States (CFIUS) which reviews any transaction that could result in foreign control of any person engaged in interstate commerce in the United States. Because Chinese nationals own the Ralls Corporation, CFIUS determined, after an investigation, that the acquisition by Ralls threatened national security interests due to certain location of the wind farms being in military restricted areas. CFIUS forwarded the investigation to the president, who issued a presidential order that prohibited Ralls's acquisition of the American owned companies.

c. Issue

Ralls protests that the investigation and Presidential Order violated the Due Process clause of the Fifth Amendment because Ralls was never provided the opportunity to review and respond to the evidence in which CFIUS and the president used to make their determination. Ralls claims it was never informed of the gravity of concern by CFIUS with the transaction at any time, nor was any information ever disclosed to Ralls in order to mitigate those concerns to the U.S. government.

Neither the July Order nor the CFIUS Order disclosed the nature of the national security threat the transaction posed or the evidence on which CFIUS relied in issuing the orders. On September 28, 2012, the President issued an Order regarding the acquisition of four U.S. Wind Farm Project Companies by Ralls Corporation stating there is credible evidence that

leads [the President] to believe that Ralls might take action that threatens to impair the national security of the United States. (*Ralls Corporation v. CFIUS*, 2014)

It is undisputed, and both parties concede, that neither CFIUS nor the president gave Ralls notice of evidence in which the determination was based upon, nor the opportunity to respond and rebut such evidence.

d. Rule

Due Process Clause requires the government to respect all rights, guarantees, and protections for all U.S. citizens afforded by the U.S. Constitution before the government can deprive a person of life, liberty, or property. Due process essentially guarantees that a party will receive a fundamentally fair, orderly, and just judicial proceeding. Procedural due process aims to ensure fundamental fairness by guaranteeing a party the right to be heard, ensuring that the parties receive proper notification throughout the litigation, and ensures that the adjudicating court has the appropriate jurisdiction to render a judgment. (LII, 2015)

Nonjusticiable Political Question/Political Question Doctrine is a ruling by the Supreme Court in which that federal courts should not hear cases that are directly involved with issues that the U.S. Constitution makes the sole responsibility of the other government branches to make.

e. Application

The U.S. government responds to the denial of due process claim by offering to the court several applications of constitutional claims and their application under several circumstances. The U.S. government infers, from legislative history that under current statute authority of the president to declare determinations, any review of presidential actions are to occur in Congress and not by judiciary courtrooms. The court finds no clear and convincing evidence through legislative history that the intended authority given to the president, and presidential actions subject to review by Congress, intended to preclude or withhold a judicial forum where constitutional due process claims are to be heard.

The U.S. government argues that Ralls's due process challenge is a nonjusticiable political question as described during the *El-Shiffa v. U.S.* (2004) case whereas

such decisions entrusted to the executive branch are not subject to judicial review of discovery or establishment of manageable standards for resolution. The court assesses if a discriminating analysis of the particular question posed in the specific case before the court to determine whether the political question prevents a claim from going forward and quotes from *El-Shiffa v. U.S.* (2004) that the judiciary is the ultimate interpreter of the Constitution and in most instances, claims alleging its violation will rightly be heard by the courts. (*Ralls Corporation v. CFIUS*, 2014)

The court applies an analogy to the Secretary of State's Foreign Terrorist Organization (FTO) designation by illustrating three criteria to establish a distinction between a justiciable legal challenge and a nonjusticiable political question. The Secretary of State may designate an entity as a FTO if the organization is foreign, the organization engages in a terrorist activity, and that terrorist activity of the foreign organization threatens the national security of the United States. The court determines that the first two statutory criteria are judicially reviewable, but outside the jurisdiction of the court is the review of what the secretary's findings were that determines the organization to threaten national security because the question involves foreign policy and national security decisions by the executive branch in which the judiciary branch has "neither the aptitude, facilities, nor responsibility" (*Ralls Corporation v. CFIUS*, 2014) to make, and therefore upon what standards of evidence or finding to determine if an entity threatens national security becomes a nonjusticiable political question. Ralls does not challenge the claim of a nonjusticiable question is to be reviewed or not but challenges the Due Process Clause in which they are entitled to have notice and access to the information and evidence on which the president relied upon to make a nonjusticiable determination and have an opportunity to respond and rebut if applicable.

There is no dispute that Ralls possessed state law property interests when it acquired the companies and their assets before CFIUS's investigation whereas valid contracts are considered property under the Fifth Amendment. Because state law recognizes the property interest, the protections of the Due Process Clause should be provided. However, the government argues that because Ralls's acquisition was known to

Ralls as a subject to the risk of presidential veto and waived the opportunity to obtain a determination from CFIUS and the president before finalizing the acquisition, Ralls's property interests are waived from constitutional protections. The court responds with stating that Ralls's property interests were not waived because the acquisition was contingent until approved by the federal government because the federal government cannot evade due process protections afforded to state property by "simply announcing future deprivations of property may be forthcoming. What the court questions is what process is due?" (*Ralls Corporation v. CFIUS*, 2014) The court defines due process as the following:

Unlike some legal rules, due process is not a technical conception with a fixed content unrelated to time but flexible and calls for such procedural protections as the particular situation demands. Due process ordinarily requires that procedures provide notice of the proposed official action and the opportunity to be heard at a meaningful time and in a meaningful manner. Those procedures, which have been held to satisfy the Due Process Clause, have included notice of the action sought, along with the opportunity to effectively be heard. Both the Supreme Court and this Court have recognized that the right to know the factual basis for the action and the opportunity to rebut the evidence supporting that action are essential components of due process. (*Ralls Corporation v. CFIUS*, 2014)

However, the court makes a strong point that due process does not require disclosure of classified information supporting official action and "classified information is within the privilege and prerogative of the executive, and do not intend to compel a breach in the security which that branch is charged to protect" (*Ralls Corporation v. CFIUS*, 2014). The government argues that Ralls received adequate process with the opportunity to present evidence in Ralls's favor under which Ralls was notified that its transaction was subject to review. Because of the national security interests by the executive branch, no further process was due.

f. Conclusion

The court concluded the following:

The Presidential Order deprived Ralls of its constitutionally protected property interests without due process of law. As the preceding discussion makes plain, due process requires, at the least, that an affected party be

informed of the official action, be given access to the unclassified evidence on which the official actor relied and be afforded an opportunity to rebut that evidence. Because Ralls had the opportunity to present evidence to CFIUS and to interact with it, then, is plainly not enough to satisfy due process because Ralls never had the opportunity to tailor its submission to the Appellees' concerns or rebut the factual premises underlying the President's action. (*Ralls Corporation v. CFIUS*, 2014)

g. Summary

(1) What decision is being made?

- What processes are due which are constitutionally protected?
- What type of information must be made available in order to address a concern and provide an opportunity to respond?
- Who is responsible for making the decision?

The court determines that because the order violated due process does not mean that presidential decisions are subject to disclosure relative to his discretion and national security interests. The decision-making process should provide access to unclassified material for the respondent to address because only after a compiled record review will the president make a determination, thus allowing for due process.

(2) What standard of evidence is necessary to make the decision?

In this case, the standard of evidence is clear and convincing that the appellants had state property interests which afforded them constitutional protection rights under the Fifth Amendment. What is not clear is the standard of evidence in which CFIUS and the president used to determine a national security threat, nor is it subject to review, but implied that in good faith clear and convincing evidence is the standard on which a determination is made.

(3) Upon whom does the burden of proof reside?

The burden of proof resides on the claimant or party subject to review to provide clear and convincing evidence asserting factual statements for which the reviewing party can make a conclusion and determination. Due process is given when notification and the opportunity to respond is given with access to unclassified information in order to address the concerned.

(4) What risk is inherent in the decision(s)?

The risk in this decision requires notification and release of unclassified information even when national security interests are at stake if the defending party is entitled to constitutional protections. This does not call into question the authority or discretion to make a determination but the notification of review. Such notifications could effectively undermine the purpose of the investigations or ultimately increase the relevant associated risks.

6. Case Review Conclusion

Overwhelmingly, the burden of proof resides on the claimants to provide clear and convincing evidence supporting their argument. The defendant, typically the U.S. government, government official, or contracting officer has the burden of persuasion to demonstrate their actions were not arbitrary, capricious, or an abuse of their discretion. Key is an articulation of a satisfactory explanation for their actions, including a rational connection between the facts and the choices made under an evaluation as a whole. The court describes the public trust under which the executive branch and military decisions are made to make status determinations, and as such are outside the scope of the court with regards to foreign policy, military operations, and national security.

Due process ordinarily requires that procedures provide notice of the proposed official action and the opportunity to be heard at a meaningful time and in a meaningful manner. Those procedures, which have been held to satisfy the Due Process Clause, have included notice of the action sought, along with the opportunity to effectively be heard. Both the Supreme Court and the Court [Court of Appeals] have recognized that the right to know the factual basis for the action and the opportunity to rebut the evidence supporting that action are essential components of due process. (*Ralls Corporation v. CFIUS*, 2014)

But,

Due process is also observed as flexible and calls for such procedural protections as the particular situation demands, whereas in the environment of a warzone when the required notice would necessarily disclose classified material and could compromise national security, normal due process requirements must give way to national security concerns. Not only would affording due process here require disclosure of

classified information and endanger military intelligence sources, it would provide information to entities that pose a potential threat to the United States, thereby placing United States forces and operations at risk. (*MG Altus Apache Company v. United States*, 2013)

The common risk associated with these cases is the acceptance by the courts for the plaintiffs to bring forward their claims and be heard. Even though the rulings of the court are similar in so far as to protect our national security, the court offers the right to be heard post-facto of any such action. By observing this, a question of life, liberty, or property interests may act as an enemy protection. Does such Fifth Amendment interests extend to enemy status personnel by way of entering into a contract with the U.S. government? Does a U.S. government contract demonstrate a substantial voluntary connection with the United States resulting in Constitutional protections and entitlement to Fifth Amendment rights? If so, those entities that may operate as enemies to the U.S. government or affiliated with the enemy have an interest to enter into a contract with the U.S. government because of the protections the Constitution affords. At a minimum, it is demonstrated that an enemy or those entities affiliated with an enemy will have the opportunity to bring their case forward and be heard in federal court. Albeit, the burden of evidence is on the claimant to clearly prove a substantial voluntary connection, the Fifth Amendment recognizes contracts as property. As such, the court will call forward our government officials during a time of war that will untimely take undo focus off of the mission at hand, create a burden onto the official, and ultimately degrade warfighter support. The KO must demonstrate systematic past performance patterns to support a satisfactory explanation and rational connection between the facts, as a whole, for a nonresponsibility determination.

E. CUMULATIVE EFFECTS OF POLICY, PROCESSES, AND CASE LAW

The U.S. government has a bon fide interest in preventing contracting with the enemy. Unfortunately, the tools available to government officials right now are overly burdensome and subject to judicial scrutiny when they result in a due process deprivation and or de facto debarment. Additionally, the evidentiary standards necessary to suspend and debar contractors for a period of time require evidentiary standards that are more

severe than current government policy for the lethal targeting of U.S. citizens abroad who are involved in terrorist organizations. As a result, the government has relied on contracting officers to execute prudent responsibility determinations to prevent enemy-affiliated contractors from competing for awards in Afghanistan. The MG AA case indicates that contracting officers must execute thorough due diligence prior to providing a nonresponsibility determination for a prospective contractor. Furthermore, they must thoroughly document their justifications for the nonresponsibility determination in the contract file as it may be challenged in the COFC if the determination resulted in de facto debarment. While the COFC has ruled in favor of the U.S. government's interests in de facto debarment cases resulting from contracting-with-the-enemy scenarios, the contracting officer must execute the somewhat burdensome step of performing due diligence for the nonresponsibility determination. That extra effort, may result in extended PALT times for critical services in contingency environments as contracting officers must thoroughly analyze potential prime contractors and their sub-contractors for evidence of enemy affiliations. Although current policy and practices are burdensome, the case law we reviewed suggests that there is potential for reform.

The existing case law we reviewed provide strong precedence for discretion within executive branch agencies when contracting with or targeting enemy agents or organizations during a period of war or hostility. First, the *Filor* case establishes a historical precedence that allows the U.S. government to void and terminate contracts with enemy-affiliated businesses. In the *El-Shiffa* case, the court upheld the executive branches discretion to destroy enemy property overseas. In the *Al-Aulaqi* case, the executive branches decision to lethally target a U.S. citizen who was a senior leader in AQAP was upheld as the court determined due process rights are flexible in nature and can be waived in favor of national security interests. Finally, in the *Ralls* case, the court upheld the U.S. government's decision not to disclose classified information to the plaintiff, therefore depriving them of full due process rights in the name of national security. While the current processes for preventing contracting with the enemy are complicated by the prospect of judicial review, the standing body of case law typically grants significant latitude for executive branch agencies to make decisions regarding

prospective contractors and the targeting of enemy property when significant national security interests are at stake. In the final chapter, we will conclude our study by reiterating the results of our research and identifying a policy recommendation aimed at better managing the enemy contractor predicament.

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IV. CONCLUSION

Contracting-with-the-enemy represents an emerging and dynamic threat to U.S. contingency operations worldwide. Left unmitigated, enemy- affiliated contractors have the potential to cause grave harm to U.S. interests either financially or through greater access to U.S. facilities and personnel. Despite efforts to address the problem, the contracting officer is left facing a dilemma in which they must apply ill-suited contracting processes to effect a military decision. Occasionally, those contracting processes found in the FAR, are not strong enough to completely prevent an enemy-affiliated contractor from competing on a contract. When that happens, the contracting officer may find their decision to prevent an enemy-affiliated contractor from competing for a contract challenged in the court of law. While the COFC has ruled in favor of the U.S. government's interests in contracting with the enemy related cases to date, the fact that they are allowing the contractors to argue a due process claim suggests that contracting officers should be extremely diligent with the tools they use to limit competition.

A. FINDINGS

In this section, we provide the conclusive findings to our research. Our findings are organized in terms of our original research questions postulated in chapter one.

- How can standard contracting processes like those authorized by the FAR be used by contracting officers to prevent contracting with the enemy?

DOD uses the vendor vetting system to gather intelligence on and determine whether or not prospective contractors are in fact affiliated with enemy organizations. That process of discovery and determination of enemy-affiliated contractors occurs exclusively within the military chain of command in the various GCCs. Once a prospective contractor is determined to be affiliated with an enemy organization, the responsibility lies with in the theater contracting chain of command to terminate, void, and prevent that contractor from contracting with the U.S. government. The tools available to contracting officers to do so are limited to those found in the FAR. In order

to prevent entering into a new contract with an enemy-affiliated contractor, contracting officials use responsibility determinations, suspension, and debarment.

The responsibility determination is the primary means available to contracting officers to limit an enemy-affiliated contractor from competing for a contract. The responsibility determination decision is delegated to the individual contracting officer and does not typically afford due process rights to the affected contractor. Ideally, all of the contractors identified by the vendor vetting process would also be suspended and debarred. However, the Army has been reluctant to do that due to higher evidentiary standards and greater due process rights on behalf of the contractors. Therefore, contracting officers have resorted to repeated uses of nonresponsibility determinations to prevent prospective enemy-affiliated contractors from competing.

- How do the evidentiary standards and burdens of proof required to prevent an enemy-affiliated contractor from competing for a contract compare with enemy status determinations including lethal targeting?

Our research suggests a wide disparity exists between the evidentiary standards and burden of proof associated with enemy status determinations and those same standards associated with the standard contracting processes found in the FAR. Specifically, the legal criteria used by the Obama administration to lethally target U.S. citizens who are senior leaders in terrorist organizations are significantly less strict than the legal criteria associated with debarment decisions. Moreover, the government's authority to lethally target U.S. citizens who are senior leaders in terrorist organizations overseas was upheld in *Al-Aulaqi et al. vs. Panetta et al.* when the court ruled that national security interests outweighed Al-Aulaqi's due process rights. Furthermore, the president's authority to destroy the property of non-resident alien's was upheld in *El-Shiffa Pharmaceutical Industries Co. & Idris v. The United States* on the basis that the national security threat associated with El-Shiffa's property justified a preemptive air strike. In conclusion, there are significantly more legal burdens associated with the application of standard contracting processes to prevent enemy contracting than there are with enemy status determinations to include lethal targeting.

- What conflicts are created when contracting officers use standard contracting processes to exclude sources from competition in order to achieve the military goal of preventing enemy businesses from competing for contract award?

Preventing contracting-with-the-enemy is fundamentally a military goal. If an enemy-affiliated business is able to secure a contract with the U.S. government, they would might gain access to critical U.S. infrastructure as well as reaping the financial rewards of contract performance. Therefore, contracting officers must pursue all means available to prevent this from happening. Unfortunately, our research concludes that the current tools available to CCOs to prevent contracting with the enemy are ill suited. The standard contracting processes found in the FAR, like responsibility determinations and suspension and debarment proceedings, were designed to limit competition opportunities for contractors with poor track records of performance. In order to limit subjective nonresponsibility determinations and or suspension and debarment, both processes include checks and balances that afford some level of due process on behalf of the contractor while requiring the government to establish evidentiary cause for their use. In a war time environment where a potential enemy-affiliated contractor may be financially supporting an enemy entity or worst actively planning an attack against U.S. infrastructure themselves, the standard contracting processes do not sufficiently limit their opportunity for competition.

The requirement for some form of due process on behalf of the contractor is further complicated in contracting-with-the-enemy situations when government officials rely on classified information to make their decisions. In the case of *MG Altus Apache Company v. United States*, the contracting officer made a nonresponsibility determination with the use of classified information provided through the CENTCOM vendor vetting program. The contractor challenged that decision in the COFC, claiming that the contracting officer's decision was arbitrary and capricious. While the court ultimately sided on behalf of the government, the fact that they allowed the case to be tried implies that contracting officers must be exceptionally diligent when effecting a nonresponsibility determination based on information provided by the vendor vetting program.

B. RECOMMENDATIONS

Contracting-with-the-enemy is a very real threat that has the potential to cause grave physical and monetary harm to U.S. contingency operations. It is a risk that we are aware of and must act to mitigate. In order to do so though, we must depart from the standard contracting processes found in the FAR. Additionally, we must modify the relationships between military command authority and contracting authority in order to preserve our national security interests against the threat of contracting with the enemy. In the following recommendations, we provide specific guidance to policy makers mitigate the contracting-with-the-enemy problem.

(1) Recommendation #1: Modify the Vendor Vetting Program

Figure 5 depicts a modified vendor vetting program that would grant GCCs the authority to deem enemy-affiliated contractors ineligible for contract award. Our recommendation would function very much like the current vendor vetting program in operation in Afghanistan previously depicted by Figure 4. However, our recommendation grants GCCs the authority to determine enemy-affiliated contractors to be ineligible for competition, instead of simply identifying enemy-affiliated contractors and referring them to the contract chain of command for action. FAR § 2.101 states that “ineligible means excluded from Government contracting (and subcontracting, if appropriate) pursuant to statutory, Executive order, or regulatory authority other than this regulation” (2015). We recommend that the authority to declare an enemy-affiliated contractor ineligible be granted to combatant commanders for use during declared contingency operations.

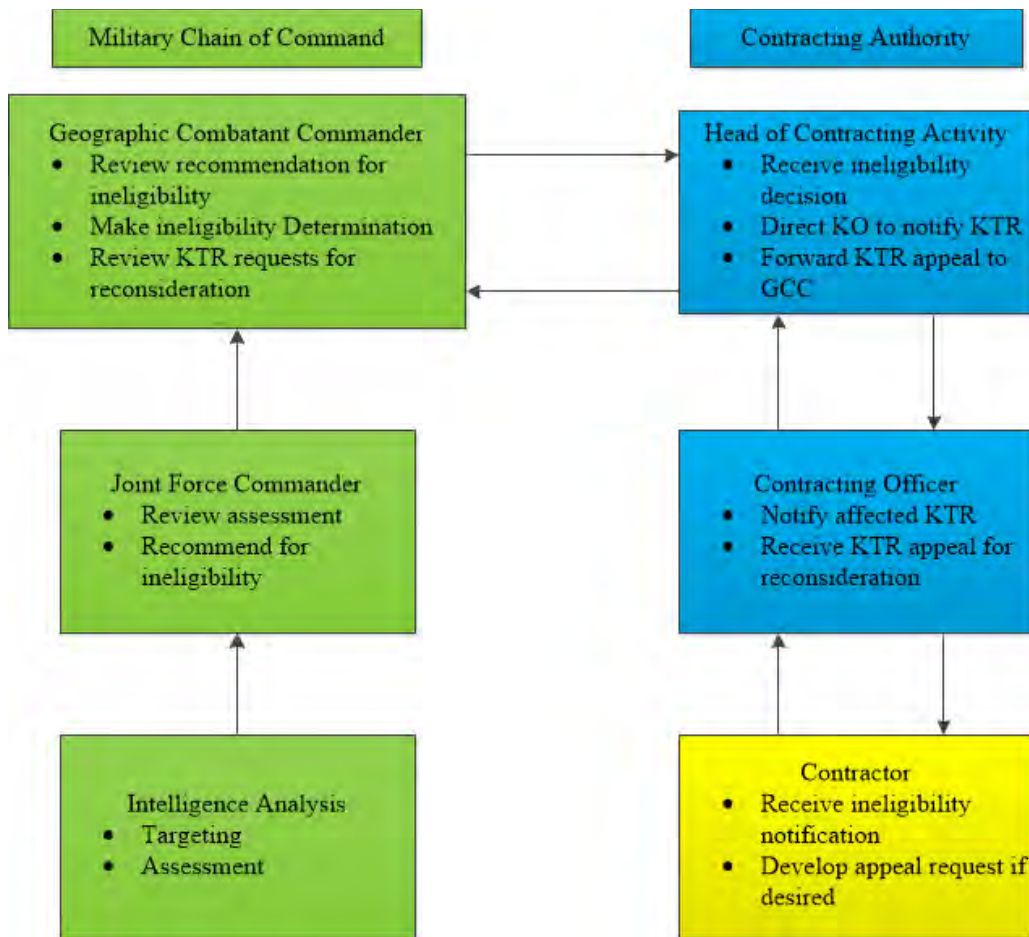


Figure 5. Modified Vendor Vetting Program

In our recommendation an intelligence analysis organization that functions like TF 2010 in Afghanistan would be responsible for identifying and conducting analysis of potential enemy-affiliated contractors operating within the joint force commands area of operations. Upon identification of a potential enemy-affiliated contractor, they would develop a targeting package and forward it to the joint force commander for review and concurrence. If the joint force commander determines that the enemy-affiliated contractor should be reviewed for ineligibility, they would forward their recommendation to the geographic combatant commander who has overarching responsibility for the contingency operation. The geographic combatant commander could then decide whether or not to deem the suspect contractor ineligible. If the GCC makes an ineligibility determination, that decision would then be routed to through the HCA to the contracting

officer who would then make an attempt to notify the prospective contractor that they were deemed ineligible by the geographic combatant commander due to suspected affiliation with the enemy. We recommend that the notification not convey classified information to the contractor, but instead simply notify them that they have been deemed ineligible for future contract competition. Under our recommendation, the contractor would then be granted the option to appeal the decision to the geographic combatant commander, but the burden of proof to prove their innocence of enemy affiliation would be rest solely with the contractor. Any appeal requests from the contractor would then be forwarded from the contractor to through the contracting officer and HCA back to the geographic combatant commander for decision.

We recognize that granting greater authority to the military chain of command vice the contracting line of authority is controversial. However, the ultimate responsibility for identifying and mitigating risk within a contingency environment rests with the military chain of command. Since contracting-with-the-enemy poses a grave risk that transcends typical contracting risks, we feel it is necessary for the military chain of command to assume full responsibility for the restriction of enemy-affiliated contractors.

We find that the body of court precedence supports our recommendation as well. *James Filor et al. v. The United States* first established the legal precedence for the U.S. Government to deem enemy-affiliated businesses as ineligible for payment. More recent cases have upheld the U.S. Government's right to waive or limit due process rights in the name of national security interests even when individual persons are lethally targeted like in the case of *Al-Aulaqi et al. v. Panetta et al.* Therefore, we believe that the national security interests at stake outweigh the right to full due process for enemy-affiliated contractors.

(2) Recommendation #2: DPAP Issues Policy Letter Directing Use of Modified Vendor Vetting Program

The office for Defense Procurement and Acquisition Policy (DPAP) has the authority to issue class deviations to the DFARS. They routinely do so in order to issue new directives and clarifying guidance specific to DOD acquisition officials. The director

of DPAP must issue a signed memorandum declaring a class deviation to the DFARS directing all geographic combatant commands to establish a modified vendor vetting program granting combatant commanders the authority to declare enemy-affiliated contractors ineligible. This deviation should specify that the modified vendor vetting program would only grant combatant commanders the authority to deem contractors eligible for contracts that are directly related to an ongoing declared contingency operation.

(3) Recommendation #3: Congress Includes a Policy Rider in FY 2016 NDAA Authorizing Modified Vendor Vetting Program

Congress routinely includes policy riders pertinent to contingency contracting operations in the National Defense Authorization Act (NDAA). The upcoming FY 2016 NDAA provides a unique opportunity for members of congress to direct the implementation of our modified vendor vetting program. This act of congress would codify the authority for geographic combatant commanders to deem enemy-affiliated contractors ineligible.

(4) Recommendation #4: Review Current Operational Practices for Areas of Improvement

To immediately address the problem of contracting with the enemy, all contingency contracting organizations within the DOD should conduct an internal review of current operational practices. The review should focus on actions taken by contingency contracting officers to screen for enemy-affiliated contractors and eliminate them from competition. More specifically, contingency contracting officers must be aware of the need to thoroughly document all nonresponsibility determinations involving suspected enemy-affiliated contractors.

C. AREAS FOR FURTHER RESEARCH

Areas for further research include, but are not limited to the following:

- An analysis of the classified material from Iraq and Afghanistan pertinent to the contracting-with-the-enemy topic. That study could review classified contracting files from Iraq and Afghanistan or conduct

interviews of past contingency contracting officers affected by enemy-affiliated contractors.

- An analysis of the contracting officer's role in the *The U.S. Army Operating Concept*. Specifically, how can contingency contracting officer's assist the joint force commander's goal of creating multiple dilemmas for enemy forces on tomorrow's battlefield.
- An analysis of the potential capacity for geographic combatant commands to assume the added responsibility of making ineligibility determinations of potential enemy-affiliated contractors.
- A comparison of the standard contract processes mentioned in this study with the legal standards associated with military tribunals and commissions.

D. CONCLUSION

In this study, we conducted a comprehensive analysis of the contracting-with-the-enemy phenomenon and related legal cases. As a result of our study, we concluded that the typical tools available to contracting officers to prevent enemy-affiliated contractors from competing on future contracts are the responsibility determination and suspension and debarment. However, those tools are ill suited for dealing with enemy-affiliated contractors because they allow for due process on behalf of the contractor. We conclude that the potential risk of enemy-affiliated contractors greatly outweighs the government's requirement to extend full due process rights. Therefore, we proposed a recommendation that would give geographic combatant commanders the authority to deem enemy-affiliated contractors ineligible. While this recommendation could not possibly mitigate every instance of businesses or individuals who want to simultaneously do business with and harm the U.S. Government interests, we feel it would represent a substantial improvement on current practices.

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